

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

AT&T CORP.,	)	
	)	
	)	
Complainant,	)	
	)	FCC Docket No. 14-209
v.	)	File No. EB-09-MD-010
	)	
ALL AMERICAN TELEPHONE	)	
COMPANY, INC., e-PINNACLE	)	
COMMUNICATIONS, INC., AND	)	
CHASECOM,	)	
	)	
Defendants.	)	

**ALL AMERICAN TELEPHONE CO.,  
e-PINNACLE COMMUNICATIONS, INC. AND CHASECOM  
ANSWER AND AFFIRMATIVE DEFENSES RE  
AT&T CORP.'S SUPPLEMENTAL COMPLAINT FOR DAMAGES**

All American Telephone Co. ("All American"), e.Pinnacle Communications, Inc. ("e-Pinnacle") and ChaseCom (jointly, the "Collection Action Plaintiffs" or "CAPs"), hereby provide their Answer and Affirmative Defenses to the Supplemental Complaint for Damages filed by AT&T Corp. ("AT&T") in the above-captioned proceeding, dated October 24, 2014 ("Supplemental Complaint").

**ANSWER**

1. No response is required to paragraph 1 of the Supplemental Complaint.
2. The first sentence of paragraph 2 is admitted. The CAPs deny that AT&T may seek damages before this Commission, and that the Supplemental Complaint adequately addresses the additional issues referred by the federal District Court for the Southern District of New York, ("SDNY"). Footnotes 1 and 2 do not require a response.

3. In paragraph 3, AT&T makes numerous assertions regarding the Commission's findings in its "*Liability Order*."<sup>1</sup> That *Order* speaks for itself. The CAPs categorically deny AT&T's assertion that they "did not actually offer any services to AT&T . . . ." Such language does not appear anywhere in the *Liability Order*, and the Commission never made such a finding, either in the *Liability Order* or the *Reconsideration Order*. Instead, AT&T takes the Commission's finding that the CAPs did not provide service "pursuant to their tariffs"<sup>2</sup> and attempts to contort that finding into a legal conclusion that the CAPs did not provide any service whatsoever to AT&T. As demonstrated in this Answer and the accompanying Legal Analysis in Support of their Answer and Affirmative Defenses, Motion to Dismiss and Petition for Declaratory Ruling (the "Brief"), AT&T has already stipulated and pled to the fact that it received service from the CAPs, and is now stopped from arguing the contrary. AT&T's assertion that the *Liability Order* holds that the CAPs "merely served as vehicles for billing" is inaccurate – that term appears nowhere in the *Order*. Nevertheless, the CAPs admit that they billed AT&T for the Local Switching service that was provided by Beehive, and assert that, like any other billing/sales agent, they are due payment for the services they had caused to be delivered. The CAPs deny that the rates charged for the Local Switching services taken by AT&T "could not have been billed absent the sham arrangements" – the CAPs demonstrate in this Answer and in the accompanying Brief that, as a matter of fact and law, the Beehive tariffed rate for Local Switching, which is the rate that AT&T stipulates was billed by the CAPs, is the only rate that can apply to the service that AT&T has taken. The CAPs deny AT&T's assertion that the traffic at issue in this proceeding "flow[ed] to Utah. To the CAPs' information and belief, the Local Switching traffic provided by Beehive to AT&T flowed to both Utah and

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<sup>1</sup> *AT&T Corp. V. All American Tel. Co. et al.*, 28 FCC Rcd 3477 (2013) ("*Liability Order*"), recon denied, 29 FCC Rcd 6393 (2014) ("*Order on Reconsideration*").

<sup>2</sup> *Liability Order*, 28 FCC Rcd at 3492, ¶ 34.

Nevada. The CAPs admit that the *Liability Order* found that these services were billed at “high rates” but notes that the rates were never quantified, that no rate case against Beehive was ever conducted by the Commission, that the formal complaint proceeding that led to the *Liability Order* never conducted any rate analysis of any kind, and did not employ any Staff experts from the Competitive Pricing Division, and that the sole basis for the Commission’s conclusion was the Commission’s uncritical acceptance of AT&T’s assertions, and those of its expert witness.<sup>3</sup> The CAPs admit the final sentence of paragraph 3.

4. The first sentence of paragraph 4 is admitted. The rest is denied. The “damages” asserted by AT&T and its witness Dr. Toof are impermissible as a matter of fact and law, are estopped by prior stipulations and testimony. Also, some of AT&T’s asserted damages have been disallowed by the Market Disputes Resolution Division (“MDRD”). Specifically, the Letter Ruling issued on October 29, 2014 and signed by Lisa Griffin, MDRD Deputy Chief (“*October 29, 2014 Letter Ruling*”), states:

Some aspects of the damages Complaint exceed the scope of the referred issues, and they otherwise do not involve technical or policy considerations within the FCC’s “specialized experience, expertise, and insight. Consequently, the Commission will not address (1) any damages allegedly owed to AT&T relating to AT&T’s payments to Beehive (Section I.B. and Count II of the Complaint); (2) calculation of interest on any damages allegedly owned to AT&T, and (3) attorneys’ fees allegedly owed to AT&T.

*October 29, 2014 Letter Ruling* at 2.

5. The CAPs deny AT&T’s assertion in paragraph 5 that they are “common carriers.” As discussed in the Brief that accompanies this Answer, the findings of the Commission in the *Liability Order* lead to the conclusion, as a matter of law, that the Collection Action Plaintiffs are not – and were not at any time relevant to this proceeding – common carriers. As to AT&T’s claims that it is entitled to have the CAPs pay it back for the access

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<sup>3</sup> *Id.*, 28 FCC Rcd at 343480-81, ¶ 12 & n.37.

charges it paid to Beehive for the services it took from Beehive, plus pre-judgment interest, these claims have been disallowed by the *October 29, 2014 Letter Ruling*. That Ruling also disallows consideration of attorney's fees, cited in footnote 3.

6. The CAPs deny AT&T's assertion in paragraph 6 that its Supplemental Complaint adequately addresses the SDNY Court's referral issue 2. AT&T repeats its patently untrue assertion that the CAPs "had not provided any services to AT&T." As a matter of fact, this is belied by the record of the instant proceeding, including AT&T's stipulations and testimony. AT&T asserts that the only way the CAPs could obtain payment from AT&T is through a valid tariff or a contract negotiated with AT&T. This is only true for the recovery of rates regulated by the Commission, under a regulatory scheme that is enforceable at court. However, because the *Liability Order* voided the CAPs' tariffs *ab initio*, no regulatory regime of the Commission's ever applied to the services at issue in this proceeding. As a result, the CAPs must pursue their claim in *quantum meruit* before the SDNY Court. The CAPs deny AT&T's assertion that they "defrauded" AT&T – AT&T never asserted fraud in the instant proceeding, and the *Liability Order* makes no such finding. AT&T is estopped from raising the issue in this Liability Phase proceeding. The CAPs deny AT&T's assertion that "there is no basis for reducing AT&T's damages . . . ." The CAPs will pursue discovery – denied by MDRD during the Liability Phase of this proceeding – that demonstrates that AT&T would be unjustly enriched and the CAPs would be unreasonably deprived of fair compensation, if AT&T can force the CAPs to provide it a service over the course of years without any compensation. Footnote 4 does not require a response. In footnote 5, AT&T states that the *Liability Order*, "e.g. ¶ 17," contains a finding that the Collection Action Plaintiffs "had not provided any services to AT&T." This is a pure fabrication – the plain language of that paragraph makes

clear that the Commission never made such a finding. Moreover, AT&T's stipulations and testimony confirm that it received service from the CAPs.

7. Paragraph 7 repeats that the CAPs "did not provide any services to AT&T." As noted above, the CAPs deny this, and AT&T is estopped from so claiming. The CAPs deny AT&T's assertion that equitable relief is not available from the SDNY Court. AT&T claims that, outside of a tariff or negotiated contract, the CAPs cannot impose fees. But this is only the case under the regulatory framework regulated by the FCC. The *Liability Order* establishes that this regulatory regime does not apply to the CAPs, and so they are now free to pursue equitable relief in their SDNY collection action. State-based equitable remedies are not prohibited by the Commission's Title II regulatory authority – the Brief accompanying this Answer demonstrates that the Commission, the SDNY Court, and numerous other sources of authority have consistently found that equitable relief is available in cases where tariffs do not apply, and that AT&T's own past behavior belies its assertions here. The Supremacy Clause does not bar such relief – outside of its unsupported assertion to this effect in paragraph 7, AT&T's Supplemental Complaint does not make this argument, and provides no precedent to support it. Footnote 6 does not require a response.

8. In paragraph 8, no response to footnote 7 is required. The CAPs admit that the *Liability Order* found referral question 5a to be irrelevant. The CAPs deny that referral issues 5c and 5d are irrelevant – they go to the issue of AT&T's unjust enrichment, should its theory of "damages" be accepted. Issue 5e is not only relevant to the instant case, it is required in order to establish jurisdiction, and by Commission and court precedent. The CAPs list their proposed responses to all of the questions referred by the SDNY Court in the Proposed Order appended to their Petition for Declaratory Ruling, which is being filed with this Answer. This

issue is discussed in the Brief that accompanies this Answer. Finally, AT&T repeats its argument that “the CAPs didn’t provide any service, and if they did, it’s common carrier service.” This argument is wrong as a matter of fact and law, and is the inescapable conclusion of the *Liability Order*. This issue is also discussed in the accompanying Brief.

9. The CAPs deny that AT&T is entitled to refunds of any amounts it paid them, because forcing the CAPs to provide service for years to AT&T would result in an unjust enrichment to AT&T, and an unjustified detriment to the CAPs. It would also violate the CAPs’ 5<sup>th</sup> Amendment rights against unconstitutional, uncompensated regulatory takings. As to the other “damages” claimed in paragraph 9, the *October 29, 2014 Letter Ruling* disallows AT&T’s claims for amounts AT&T paid to Beehive and pre-judgment interest. Finally, AT&T refers to “set-off” even though the Commission’s rules do not allow defendant to pursue offset claims in response to supplemental damages complaints. (47 C.F.R. § 1.722(i)(4)) The Collection Action Plaintiffs will, however, proceed to prove the revenues realized by AT&T on the traffic provided by the CAPs, to pursue their unjust enrichment case against AT&T, and to demonstrate that no damages should be, or can be, awarded to AT&T.

10. Upon information and belief, the CAPs admit the statements made in paragraph 10 of the AT&T Supplemental Complaint. Footnotes 8 and 9 do not require a response.

11. All American admits the allegations of paragraph 11. Footnotes 10-12 do not require a response.

12. All American admits the allegations of paragraph 11. Footnote 13 does not require a response.

13. All American admits the allegations of paragraph 13. Footnotes 14-17 do not require a response.

14. All American admits the allegations of paragraph 14. Footnote 18 does not require a response.

15. e-Pinnacle admits the allegations of paragraph 15. Footnotes 19-22 do not require a response.

16. ChaseCom admits the allegations of paragraph 16. Footnote 18 does not require a response.

17. The Collection Action Plaintiffs admit that, prior to the ruling in the *Liability Order*, they held themselves out to be providing service as common carriers. This is why they maintained that their tariffs were valid, and sought enforcement in federal court under the Filed Rate Doctrine. However, when, on March 22, 2013 – years after the CAPs ceased providing service – the Commission ruled that their tariffs were invalid *ab initio* and that they were “sham entities” that did not act as competitive local exchange carriers, that ruling had the effect of finding that the CAPs are not now, and never were, common carriers. The CAPs briefed the reason for this inescapable legal conclusion in their Petition for Reconsideration and Clarification of the *Liability Order*,<sup>4</sup> and the Commission did not dispute or deny those arguments. This issue is further discussed in the Brief that accompanies this Answer. The Collection Action Plaintiffs deny AT&T’s assertion in paragraph 17 that they “are liable under the complaint process in Section 206 to 208 for damages . . . .” In fact, now that the *Liability Order* is final and non-appealable, the Collection Action Plaintiffs are definitively not common carriers, and are not subject to Title II jurisdiction. This means that they cannot be subject to a formal complaint, that the Commission cannot find them liable for damages, and cannot prescribe rates for the services that AT&T admittedly took from them. In this regard, the CAPs are situated as billing/sales agents for the services provided to AT&T by Beehive, and have the

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<sup>4</sup> Filed in the above-captioned docket, dated April 24, 2013.

right to be compensated for the role they played in causing the Beehive service to be provided to AT&T. This finding is fully consistent with the Commission's decision in its *Total Telecom* decision of 2001.<sup>5</sup>

18. No answer is required to paragraph. 18.

19. AT&T's assertions in paragraph 19 and footnotes 27 and 28 are admitted. All traffic invoiced by the Collection Action Plaintiffs in the instant proceeding were the Local Switching "tail circuits" of terminating interstate access service provided by Beehive. All traffic at issue terminated on Beehive facilities within Beehive exchanges in Utah and Nevada. The CAPs deny that Beehive should be characterized as a "non-party." In fact, because AT&T's "damages" claims involve issues of fact that are exclusively within the control of Beehive, Beehive must be made a party to the instant proceeding if the Commission proceeds to conduct a rate inquiry in this proceeding. The CAPs do not believe this step necessary, however, because the Commission can and should conclude this case without further proceedings by issuing a Declaratory Ruling, or an order based on the Supplemental Complaint, this Answer, and AT&T's Reply.

20. All American admits to AT&T's assertions made in paragraph 20, and footnotes 29-33. Specifically, All American admits AT&T's assertion that Joy was the sole customer for the service that All American invoiced to AT&T. As All American has demonstrated in its pleadings throughout the Liability Phase of this proceeding, both AT&T and the Commission have been fully aware that Beehive was providing "access stimulation" service by terminating calls to Joy Enterprises, Inc. since 2002.<sup>6</sup> Indeed, the Commission prescribed the access rates

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<sup>5</sup> *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726, ¶ 16 (2001) ("*Total Telecom*").

<sup>6</sup> *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641 (2002).

that Beehive could charge for Joy access stimulation traffic in 2002,<sup>7</sup> and AT&T signed a settlement agreement that required AT&T to pay Beehive's tariffed access charges for all its traffic – which AT&T knew to include terminating access service to Joy chat and conference bridges – on August 20, 2007. That settlement agreement was in effect, and compelled AT&T to pay Beehive's tariffed access rates, at all times relevant to this proceeding.<sup>8</sup>

21. AT&T's description of the Collection Action Plaintiffs' complaint against AT&T before the SDNY Court is incorrect in that the complaint did not seek recovery of intrastate charges made under intrastate tariffs for the CAPs. The assertions in paragraph 20 are otherwise admitted. Footnotes 34 and 35 do not require responses.

22. CAPs admit that AT&T's characterization of its Answer and Counterclaims in the SDNY Court collection action that appear in paragraph 22 are accurate. Footnotes 36-39 do not require responses.

23. The assertions of paragraph 23 are admitted. Footnotes 40-44 do not require responses.

24. The assertions of paragraph 24 are admitted. Footnotes 45-47 do not require responses.

25. The CAPs deny AT&T's assertions in paragraph 25 that the AT&T complaint "addressed" referral issues 1a – 1e and issues from the SDNY Court's first referral order. The CAPs protested that as the defendant of the SDNY Collection Action, which opposed referral, AT&T should not be made the complainant in the formal complaint process designated to

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<sup>7</sup> Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant proceeding and dated June 14, 2010, at 12-13, 15, 41, 44-47 (AT&T and Beehive have been at war over access stimulation for 15 years, and have brought multiple actions before the Commission during that time, most resolved in favor of Beehive. The Commission prescribed switched access rates for Beehives access stimulation traffic in 1997 in *Beehive Tel. Co., Inc., Beehive Tel. Co., Inc. of Nevada, Tariff FCC No. 1*, PA 97-1674, Suspension Order, 12 FCC Rcd 11695 ¶ 3 (1997)).

<sup>8</sup> The settlement agreement is discussed in detail in a Confidential section of the CAP Brief that accompanies this Answer.

respond to the SDNY Court's referral. That objection was dismissed by MDRD. However, the CAPs demonstrated that AT&T abused its position as complainant in the referral proceeding by misrepresenting the referral questions and failing to present them adequately for Commission consideration. The MDRD responded to the CAPs' objections by allowing them to file a Surrebuttal that appropriately presented the referral questions to the Commission. The CAPs filed their Surrebuttal on August 4, 2010. The CAPs deny that AT&T's complaint addressed referral issue 1, which asks if the CAPs provided "switched access service." To date, this issue has not been addressed by the Commission. The CAPs otherwise admit to AT&T's interpretation of its Amended Complaint. In particular, the CAPs admit that AT&T argued that the amounts billed to AT&T for the terminating Local Switching access services that AT&T admits to taking from the CAPs was "inflated." The CAPs note that Count II of the Amended Complaint admits that the traffic should have been billed at "a fraction of a penny,"<sup>9</sup> thereby admitting that the cost and value of the service that AT&T took from the CAPs was not zero. The assertion in footnote 48 is admitted.

26. The CAPs deny AT&T's characterization of its Amended Complaint in paragraph. 26. AT&T's Count III asserts that, under AT&T's theory, the CAPs cannot obtain compensation for "regulated services" except through tariffs, negotiated contracts, or Commission rule.<sup>10</sup> The CAPs note that the predicate to this argument is AT&T's admission that the CAPs provided service to AT&T, and AT&T took service from them. The CAPs deny that the Amended Complaint "addressed" referral issues 5a, 5c, 5d, and 5e. As discussed in answer to paragraph 25, the CAPs demonstrated to MDRD that AT&T abused its position as complainant to ignore or misrepresent these referral issues, and so were granted a right to

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<sup>9</sup> AT&T Amended Formal Complaint, dated May 7, 2010, at ¶ 135 ("Am. Complaint").

<sup>10</sup> Am. Complaint at ¶ 139.

submit a Surrebuttal to properly put the issues before the Commission. The CAPs deny that AT&T “demonstrated” that these referral issues do not affect the issues in this proceeding. None of those issues were addressed by the Commission in the *Liability Order*. Footnotes 49 and 50 do not require a response.

27. The assertions of paragraph 27 and footnotes 51 and 52 are admitted. The CAPs note that they objected to the bifurcation of issues in to “liability” and “damages” phases, on the grounds that it would cause unreasonable delay – which it unquestionably did – and because the referral issues presented questions of law that the Commission could address without delay. MDRD dismissed these objections.

28. The *Liability Order* speaks for itself. The CAPs deny that the paragraphs cited by AT&T stand for the propositions that AT&T asserts. The CAPs do not contest AT&T’s description of the conclusions reached by the Commission in the *Liability Order*. The Collection Action Plaintiffs do note, however, that Beehive was never made a party to the case, despite the CAPs’, and Beehives’ objections. The Commission never analyzed the full terminating circuits, and never determined if the number and routing of Local Switching MOUs invoiced by the CAPs matched the number and routing of terminating Tandem Switching, Tandem Transport and Tandem Switch Termination elements invoiced by Beehive for the same calls. The Commission never examined whether the traffic at issue was properly invoiced under Beehive’s Nevada or Utah rates. The Commission never considered whether Beehive’s rates for the traffic at issue were reasonable, and the CAPs never had the opportunity to question either AT&T or Beehive witnesses regarding these issues, despite their consistent claims that they could not effectively defend against AT&T’s claims without such evidence on the record. As the CAPs stated in their Petition for Reconsideration and Clarification of the *Liability Order*,

how could the Commission find that the CAPs were engaged in a “sham” arrangement to inflate rates above what Beehive could have charged, without analyzing Beehive’s rates?<sup>11</sup> Especially when AT&T stipulated that it was “not contesting Beehive’s rates” and admitted that the CAPs accurately reflected Beehive’s tariffed rates in their invoices, and when the CAPs demonstrated that AT&T had, at all times relevant to this proceeding, a settlement agreement with Beehive that compelled it to pay Beehive’s tariffed rates? The *Liability Order* never addressed these issues, and the Commission further ignored these issues when denying the CAPs’ reconsideration request. The Commission cannot ignore these issues in the present “Damages” Phase proceeding.

29. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T’s characterization of that *Order* in paragraph 29 of its Amended Complaint. However, the *Liability Order* has invalidated the CAPs’ tariffs *ab initio*, and declared the CAPs were “sham CLECs” that “had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large”<sup>12</sup> As a result of these rulings, the CAPs’ compliance *vel non* with their state-issued certificates of public convenience and necessity is irrelevant – they are not, and never were, common carriers and their tariffs never applied to the traffic at issue. For purposes of this “Damages” Phase hearing – and for purposes of finally answering the questions referred by the SDNY Court 5 ½ years ago – the only relevant questions are whether the rates tariffed by Beehive – the local exchange carrier that provided the service that AT&T admittedly took – were compliant with the Commission’s rules.<sup>13</sup> As the CAPs demonstrated in previous pleadings in the Liability Phase proceeding and their Petition for

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<sup>11</sup> Petition for Reconsideration and Clarification of All American Telephone Co., e-Pinnacle Communications, Inc. and ChaseCom, filed in the above-captioned proceeding and dated April 24, 2013, at 9-12.

<sup>12</sup> *Liability Order*, 28 FCC Rcd at 3488 ¶ 25.

<sup>13</sup> See *Total Telecom* at 5742 ¶ 37; All American Telephone Co., e-Pinnacle Communications, Inc. and ChaseCom’s Answer to AT&T Corp.’s Amended Formal Complaint, dated June 14, 2010, at 61-63 (CAP Answer).

Reconsideration and Clarification of the *Liability Order*, there can be no other conclusion than that Beehive's rates were lawful because:

- The tariffs are deemed lawful, and the statute of limitations prevents AT&T from challenging the rates now;
- The Commission and AT&T at all times knew that Beehive was providing the service underlying the CAPs' invoices, that such service was "access stimulation service" destined for Joy Enterprises and other conference and chat operators;
- That at all times relevant to the instant proceeding, Beehive's rates were either set by Commission prescription or were subject to a settlement agreement signed between AT&T and Beehive.

30. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 30 of its Amended Complaint. However, the terms of the CAPs' tariffs, and whether there are "end users" within the meaning of those tariffs, are irrelevant – the *Liability Order* invalidates the tariffs *ab initio*. As discussed in the answer to paragraph 29 above, the only relevant facts for purposes of this "Damages" Phase are that the Beehive rates – which apply to the Local Switching charges invoiced by the CAPs, as well as to the Tandem Switching, Tandem Transport and Tandem Switch Termination charges invoiced by Beehive, for every minute of traffic at issue in this case, are incontestably reasonable, and applicable to the traffic at issue in this case.

31. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 31 of its Amended Complaint. However, whether there are "end users" within the meaning of the CAP tariffs, and the CAPs' relations with their conference and chat operator customers, are irrelevant – the *Liability Order* invalidates the tariffs *ab initio*, and determines that the CAPs are not, and never were, local exchange carriers. As discussed in the answer to paragraph 29 and 30 above, the only relevant facts for purposes of this "Damages" Phase are that the Beehive rates – which apply to the Local Switching segment

of the traffic taken by AT&T, as well as to the Tandem Switching, Tandem Transport and Tandem Switch Termination segments of the service that AT&T took – are incontestably reasonable, and applicable to the traffic that the CAPs invoiced to AT&T.

32. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T’s characterization of that *Order* in paragraph 32 that the *Liability Order* found that: the CAPs engaged in a “sham” arrangement “to inflate” billed access charges to AT&T;” the CAPs “never intended to operate as bona fide CLEC or provide local exchange service to the public;” the CAPs did not own or lease facilities or unbundled network elements; that the CAPs served only a “handful of CSPs” [and in All American’s case, only one – Joy Enterprises, Inc.]. All of these findings of the *Liability Order* demonstrate that the CAPs are not – and at no time relevant to this proceeding were – common carriers. CAPs also admit AT&T’s proven assertion that, at all times relevant to this proceeding, the CAPs billed for their “traffic at tariffed rates that were benchmarked to Beehive’s NECA rates . . .” and that the CAPs were “collaborating” with Beehive. The remainder of paragraph 32 – which deals with the CAPs’ compliance with their state certificates, is admitted, but as described in the answer to paragraph 29, is irrelevant to this “Damages” Phase proceeding.

33. In paragraph 33 of the Amended Complaint, AT&T’s assertions regarding the rate-related findings of the *Liability Order* are incomplete and misleading. The relevant findings of the *Liability Order* are as follows:

1. The CAPs operated “with the apparent . . . effect of inflating their billed access charges. 28 FCC Rcd 3487, header A.
2. The CAPs were created to “capture access revenues that could not otherwise be obtained by lawful tariffs. *Id.* at 3487 ¶ 24.
3. “Creation of Defendants allowed the access stimulation arrangements to continue at rates that would have been unsustainable had Beehive remained a Section 61.39

Carrier. *Id.* at 3488 ¶ 27.

4. The Commission “will ensure just and reasonable rates through the Section 208 Complaint process.: *Id.* at 3490 ¶ 29.
5. “But for the creation of Defendants, Beehive’s scheme would have ended because, under the Commission’s rules, Beehive itself no longer could charge high rates and retain the resultant revenue.” *Id.* at 3491 ¶ 30.
6. “Defendants violated Section 201(b) of the Act by operating as sham entities for the purpose of inflating access charges that AT&T and other IXCs had to pay.” *Id.* at 3492 ¶ 33.

In making these “findings,” the Commission never identified what rates Beehive would have charged absent the “access stimulation scheme,” and never even attempted to quantify the asserted “rate inflation.” As the CAPs note in their answer to paragraph 3, above, no rate case against Beehive was ever conducted by the Commission, the formal complaint proceeding that led to the *Liability Order* never conducted any rate analysis of any kind, and did not employ any Staff experts from the Competitive Pricing Division. And the only authority cited by the *Liability Order* in support of its “rate inflation” and “unsustainable scheme” assertions is cites to AT&T’s filings, and even here, no specific numbers are ever adopted.<sup>14</sup> Of course, as CAPs complained repeatedly, they are not capable of defending Beehive’s rates, because they do not have access to Beehive’s cost and revenue data, and do not have knowledge of Beehive’s status within NECA.<sup>15</sup> That was true at the time of the Liability Phase proceeding, and remains true now. The gravamen of AT&T’s Amended Complaint, and the finding of the *Liability Order*, is that by billing for Local Switching, the CAPs somehow enabled Beehive to charge higher access rates than it otherwise could. But neither AT&T nor the FCC ever addressed a fundamental flaw in this theory – for every minute of access traffic that the CAPs billed Local

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<sup>14</sup> “Finding 1” is unsupported. “Finding” 2 cites AT&T’s complaint, reply and briefs. 28 FCC Rcd at 3487 n. 103. “Finding” 3 cites AT&T’s complaint and disputed facts. *Id.* at 3487 nn. 116 & 117. “Finding” 4 has no rate support. “Finding” 5 is unsupported. “Finding” 6 cites AT&T’s amended reply. *Id.* at 3492 n. 144.

<sup>15</sup> Cites

Switching to AT&T, Beehive billed the same minute of Tandem Switching, Tandem Transport and Tandem Switch Termination. The traffic is the same. AT&T admits this in paragraph 33 (“Beehive also continued to charge the IXCs for tandem switching and access of stimulated traffic . . .”), and elsewhere in the record of this proceeding. And the Liability Order states the same: “Beehive still made money. It charged the IXCs for tandem switching and transport of the stimulated traffic . . . .”<sup>16</sup> But if Beehive is reporting the full number of minutes of the “stimulated” traffic to NECA, how can the NECA rates applicable to this volume of traffic be excessive? Neither AT&T nor the *Liability Order* address this question, because MDRD refused to allow the CAPs to raise rate issues, and because Beehive was not made a party to the proceeding, and so could not justify its rates. So AT&T correctly quotes the *Liability Order* in the last sentence of paragraph 33, but that “finding” was never subject to any hearing and was never justified, and provides no basis for a “damages” claim in the instant proceeding.

34. The CAPs deny AT&T’s assertion in paragraph 34 that AT&T ever negotiated potential settlement in good faith. The CAPs detail AT&T’s patent bad faith in a Pre-Mediation Statement filed on December 5, 2012, and again in a letter of complaint submitted to MDRD Staff following a settlement conference on December 27, 2012. The Pre-Mediation statement is part of the public record of this proceeding. The letter of complaint is a confidential document, and is attached as Confidential Exhibit A to the Brief that accompanies this Answer, and it speaks for itself.

35. The CAPs deny that the remaining referral questions – Issues 1, 2, 3, 5a, 5d and 5e – are set forth in Count III of its Amended Complaint. As with its Amended Complaint, AT&T is using its position as plaintiff to misrepresent the questions that have been referred by

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<sup>16</sup> 28 FCC Rcd at 3489 ¶ 28.

the SDNY Court to this Commission. The questions that must be answered in the instant proceeding are:

1. Did All American, e-Pinnacle and Chasecom ("Plaintiffs") provide interstate switched access services . . . to AT&T with respect to the calls at issue?
2. If Plaintiffs failed to provide switched access services consistent with the terms of their tariffs, did Plaintiffs provide some other regulated service to AT&T for which they are entitled to compensation? If so, what is the rate that should be applied to that service?
3. If Plaintiffs did not provide a regulated service to AT&T, are Plaintiffs entitled to compensation to be established under a quantum meruit, quasi-contract or constructive contract theory, or some other theory?
5. What is the impact of the following questions on resolution of the foregoing issues?
  - a. What weight, if any, should be accorded to the FCC's finding that CLEC rates that match the prevailing ILEC rate are "conclusively deemed reasonable"? *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, at ¶ 60 (2001).
  - b. Did AT&T violate any provision of the Communications Act by refusing to pay the billed charges for the calls at issue and not filing a rate complaint with the FCC?
  - c. As a matter of telecommunications law and policy, is it appropriate for different LECs in the same service area, and absent a negotiated agreement, to charge different rates for terminating identical traffic to identical conference and chat operators?
  - d. As a matter of telecommunications law and policy, is it appropriate for the same CLEC in the same service area, and absent a negotiated agreement, to charge different rates to different IXCs for terminating identical traffic to identical conference and chat operators?
  - e. What is the classification of any service provided by Plaintiffs with respect to the calls at issue: switched access service, contract service, private carriage, or some other classification of service? Regulated service or unregulated service?

The CAPs deny that these questions are properly put before the Commission in Count III of the Amended Complaint. The CAPs admit the rest of paragraph 35. Footnotes 53-55 do not require a response.

36. The CAPs deny that they are liable to AT&T for any damages. The reasons are presented in the Affirmative Defenses that are part of this Answer, and in the Brief that accompanies it. In short: AT&T is precluded by § 207 of the Communications Act from pursuing damages before this Commission, the CAPs are not subject to the Commission's Title II jurisdiction, AT&T is estopped from pursuing its claims, its claims are precluded by Commission orders, the relief sought would violate the 5<sup>th</sup> Amendment of the Constitution, and the relief sought by AT&T would unjustly enrich AT&T and unfairly deprive the CAPs. As discussed in the answer to paragraph 4, above, the *October 29, 2014 Letter Ruling* disallows AT&T's claims for amounts AT&T paid to Beehive, pre-judgment interest and attorneys' fees. The assertions of the declaration of AT&T witness David Toof fail to support AT&T's damages claims for these reasons.

37. In paragraph 37, AT&T accurately quotes from the *YMax* decision,<sup>17</sup> but the CAPs deny that this decision is relevant to the instant proceeding because it deals with the regulatory obligations of common carriers providing regulated services. Because the *Liability Order* has determined that the CAPs are not, and never were, acting as competitive local exchange carriers, and did not, at any time provide service pursuant to a valid tariff, and so were not common carriers, regulatory obligations imposed upon common carriers by the Commission pursuant to its Title II authority are irrelevant to the CAPs. The *Liability Order* speaks for itself, nevertheless the CAPs admit the second sentence of paragraph 37.

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<sup>17</sup> *AT&T Corp. v. YMax Commc'ns*, 26 FCC Rcd 5742 (2011).

38. The CAPs deny that their collection action claims pending before the SDNY court must be dismissed, and they deny AT&T's apparent suggestion that the Commission has the authority to do so – it plainly does not. Now that the *Liability Order* has determined that the CAPs are not, and never were, common carriers, subject to Title II regulation, the CAPs are free to pursue their equitable claims against AT&T as unregulated billing/sales agents for the services that AT&T admittedly took from them. The *MCI v. Paetec* case<sup>18</sup> cited in footnote 56 is not relevant to the instant case. That unpublished decision deals with a regulated common carrier – Paetec – that was operating under a valid tariff, and calls made from wireless service providers that were transited over the Paetec network, and ultimately terminated to MCI. In the instant case, the CAPs are not, and never were common carriers, never had a valid tariff, and are not subject to Title II regulation. Moreover, wireless traffic is not involved in the instant case. The Commission has unique rules that apply to wireless carriers – they are not allowed to tariff or collect access charges on their traffic – that do not apply in the instant case. AT&T also cites *Bryan v. Bellsouth*.<sup>19</sup> The CAPs deny that this case is relevant in any respect to the case at bar. Like the *Paetec* case, it involves a type of charge that has nothing to do with the service at issue in the instant proceeding – in this case, a claim for full or partial refund of federal Universal Service Fund fees imposed on carriers by the Commission, and passed through to consumers in carrier bills. In any event, the court in that case dismissed the plaintiff's claim for a refund of fees paid, and so to the extent it is relevant at all – and it is not – the case supports the CAP position. The CAPs deny that 47 U.S.C. §§ 203 or 415 are relevant to the instant proceeding – they deal with the regulation of common carriers, and so are not applicable to the CAPs. The CAPs admit the amounts from the *Toof Report* that AT&T paid to the CAPs. The CAPs deny

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<sup>18</sup> *MCI Worldcom Network Services, Inc. v. Paetec Commc 'ns Inc.*, 2005 WL 2145499 (E.D. Va. 2005).

<sup>19</sup> *Bryan v. Bellsouth Commc 'ns, Inc.* 377 F.3d 424 (4<sup>th</sup> Cir. 2004).

AT&T's claim, or Dr. Toof's calculation, of pre-judgment interest because the *October 29, 2014 Letter Ruling* disallows this claim.

39. In paragraph 39, AT&T attempts to distinguish three Commission decisions that unequivocally hold that a provider of a service merits compensation, whether or not the service was properly tariffed. AT&T states that its direct damages claim should not be "reduced at all based on the *New Valley* cases."<sup>20</sup> It is obvious why AT&T asks the Commission not to consider these cases: they all raise identical issues to the case at bar, and reject claims for a refund of paid charges for untariffed services that are identical to AT&T's claim in the instant case. The *New Valley* cases involve a complaint against Pacific Bell, which charged its customer, and received payment for, a service that was not listed in its tariff. In dismissing the customer's claim for a refund of all monies paid to Pacific Bell, the Commission stated: "We find no basis in Maislin<sup>21</sup> or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff." That Bureau decision was later affirmed by the full Commission. Similarly, the *Farmers & Merchants III* decision is directly on point – it was the first of the "access stimulation" cases decided under the Genachowski Administration that retroactively invalidated the tariffs at issue. In that decision, the Commission expressly considered whether Farmers & Merchants could still recover compensation, despite having its tariff invalidated for access stimulation traffic, and concluded that it could:

This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g., New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12

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<sup>20</sup> Am. Complaint at ¶ 39, citing *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128 (2000) ("*New Valley Recon*"), *aff'g*, *New Valley Corp. v. Pacific Bell*, 8 FCC Rcd 8126 (1993) ("*New Valley Order*"); also citing *Qwest Commc'ns Corp. v. Farmers & Merchants Mutual Tel. Co.*, 24 FCC Rcd 14801 (2009) ("*Farmers & Merchants II*").

<sup>21</sup> *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 161 (1990),

(2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). See also *America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd. 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed").<sup>22</sup>

That case was settled by the parties and so never proceeded to a "damages phase."

Indeed, this instant case is the first "access stimulation" case to proceed to a "damages phase," and in deciding it, the Commission must follow its precedent. Indeed, many other cases besides those cited above confirm that the CAPs are entitled to compensation for the service that caused to be delivered to AT&T, and that AT&T admittedly took. These are discussed in more detail in the Brief that accompanies this Answer. Finally, the CAPs deny AT&T's sole rationale for seeking a refund of the small amounts it paid – its assertion that "the Defendants did not provide any service to AT&T." As the CAPs discuss in their answer to paragraph 3, above, this is a ridiculous fiction – AT&T takes the *Liability Order's* finding that the CAPs did not provide service pursuant to their tariffs, and attempts to contort it into the factual assertion that it never received any service at all. As discussed above, and in the Brief that accompanies this Answer, AT&T is estopped from making this argument by its own stipulations, admissions in its pleadings and witnesses' statements, and by the factual record established in the instant proceeding.

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<sup>22</sup> *Farmers & Merchants III*, 24 FCC Rcd at 14812 n.96 (emphasis added).

40. The CAPs deny AT&T's claims for prejudgment interest on the grounds that the *October 29 Letter Ruling* disallows this claim. For this reason, the CAPs deny AT&T's argument in footnote 58 and deny that the cases cited support its claim for interest damages. Footnote 57 does not require a response.

41. The CAPs deny AT&T's calculation of potential damages in paragraph 41. First, AT&T is unable to recover any damages, for reasons discussed in the following Affirmative Defenses, and in the Brief that accompanies this Answer. In addition, the *October 29, 2014 Letter Ruling* disallows AT&T's claim for prejudgment interest.

42. The CAPs deny that they are, or ever were, common carriers, per the Commission's ruling in the *Liability Order*. For the same reason, AT&T's reference to 47 U.S.C. § 206 and the *Farmers Appeal Order* is inapposite. As to the reason for AT&T's argument in paragraph 42, and Subheading B, the CAPs deny that AT&T is entitled to consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*.

43. The CAPs deny that AT&T is entitled to consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*. For this reason, the CAPs deny that the cases cited and quoted in footnotes 59 and 60 can support AT&T's claim for consequential damages.

44. The CAPs deny that the case quoted and discussed in paragraph 44 and footnotes 61 and 62 can support AT&T's claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*. The CAPs deny that they can be subject to any damages award

recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

45. The CAPs deny that there are other consequential damages that AT&T could assert, but did not. First, for reasons discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T may not seek any damages against the CAPs. Second, the consequential damages posited by AT&T in paragraph 45 and footnote 63 would be disallowed by the *October 29, 2014 Letter Ruling* as claims that “exceed the scope of the referred issues, and they otherwise do not involve technical or policy considerations within the FCC’s “specialized experience, expertise, and insight.” The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

46. The CAPs deny that the arguments made by AT&T in paragraph 46 and footnote 64 can support AT&T’s claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*. The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

47. The CAPs deny that the arguments made by AT&T in paragraph 47 and footnote 65 can support AT&T’s claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*. Moreover, as discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T is estopped from contesting Beehive’s rates by its

stipulations, admissions in its pleadings and expert testimony, its settlement agreement with Beehive and Commission findings.

48. The CAPs deny AT&T's assertion in paragraph 47, and purportedly supported by precedent cited in footnote 66, that it is "entirely reasonable, and consistent with Section 206, to require Defendants to compensate AT&T for the charges that it paid Beehive . . ." as that claim has been disallowed by the *October 29, 2014 Letter Ruling*. The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation. AT&T's assertion that "as the Commission found . . . AT&T could have elected to sue Beehive directly . . ." is a pure fabrication – the Commission never made such a finding. Moreover, as discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T is estopped from contesting Beehive's rates by its stipulations, admissions in its pleadings and expert testimony, its settlement agreement with Beehive and Commission findings.

49. The CAPs admit the statements in paragraph 49. Regarding the statement in footnote 67, the CAPs admit that every minute of traffic that they billed to AT&T represented the Local Switching "tail circuit" of Beehive's terminating switched access service, for which Beehive billed Tandem Switching, Tandem Transport and Tandem Switch Termination. The CAPs lack the knowledge of Dr. Toof's methodology, and so can neither admit nor deny the rest of footnote 67.

50. The CAPs deny AT&T's assertion in paragraph 40, and purportedly supported by precedent cited in footnotes 68 and 69, that it is "appropriate to award AT&T pre-judgment interest . . ." as that claim has been disallowed by the *October 29, 2014 Letter Ruling*.

51. The CAPs deny that AT&T may seek interest damages, regardless of the computational methodology described in paragraph 51, as that claim has been disallowed by the *October 29, 2014 Letter Ruling*.

52. The CAPs deny that AT&T may seek the consequential and interest damages that are reflected in the \$18.6 million claim stated in paragraph 52, as those claims have been disallowed by the *October 29, 2014 Letter Ruling*.

53. Paragraph 53 and Subheading C discuss AT&T's purported claim for attorneys' fees. Such claim is irrelevant to the instant proceeding, as it has been disallowed by the *October 29, 2014 Letter Ruling*. The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

54. Paragraph 54 is a statement of AT&T's intent, and does not require a response.

55. The CAPs admit that AT&T accurately quotes Referred Issue 2 in the first two sentences of paragraph 55. The CAPs deny AT&T's argument that "they provided *no* services to AT&T . . . ." (emphasis in original). This statement simply ignores reality – calls made by AT&T's long distance customers to chat and conference services were delivered to those services, and no calls were blocked – and this was never a finding of the *Liability Order*, which found only that the CAPs did not provide service pursuant to their tariffs.<sup>23</sup> Moreover, as CAPs demonstrate in the following paragraphs, AT&T and its expert witness have previously admitted in this proceeding that service was provided, and that AT&T's calls were terminated, and so AT&T is estopped from asserting the opposite now.<sup>24</sup> The CAPs deny AT&T's statement that they are "not entitled to any compensation from AT&T," and this is of course

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<sup>23</sup> 28 FCC Rcd at 3492 ¶ 34 and *passim*.

<sup>24</sup> General estoppel CITE

why they are pursuing their collection action before the SDNY Court. The issue of damages that AT&T owes to the CAPs is not before this Commission, however – the Commission is without authority to hear claims against non-carriers,<sup>25</sup> and in this case AT&T is appearing as a customer, and not a carrier.<sup>26</sup> The CAPs deny that they may only recover compensation for the services AT&T took through a tariff or negotiated contract. As the CAPs discuss at length in this Answer and the accompanying Brief, they are entitled to an award of damages in *quantum meruit* from the SDNY Court.

56. The CAPs admit that AT&T correctly quotes from two Commission orders in the first sentence of paragraph 56. The CAPs admit that the *Liability Order* stands for the proposition that they “played no role in the routing of long distance traffic from AT&T, and that they did not own any switches that were used to terminate long distance calls.” This finding that the CAPs were “sham” entities means that, at no time relevant to the instant case, did they act as common carriers. The CAPs admit that they did not employ unbundled network elements. The *Liability Order* finds, the fundamental purpose of the CAPs operations was to cause calls from AT&T’s long distance customers to be completed to the chat and conference operators that AT&T’s customers chose to call. This is, of course, the purpose of access stimulation, as recognized by the Commission in cases ranging from *Total Telecommunications* to the *Connect America Order*. As discussed further in this Answer and its accompanying Brief, it is an established fact that the CAPs successfully caused switched access voice service to terminate to the numbers that AT&T’s customers called, and AT&T is estopped from denying it. The CAPs admit that the *Liability Order* found that they did not operate as “bona

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<sup>25</sup> *MCI Telecom’s Corp. v. FCC*, 59 F.3d 1407, 1419 (D.C. Cir. 1995)(FCC cannot adjudicate carriers’ rights against their customers).

<sup>26</sup> *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, 726-28 (2011)(finding that AT&T’s self-help refusals to pay All American’s access charges does not violate the Communications Act because AT&T is acting in the capacity of a customer, not a carrier).

fide CLECs,” that they did not own or lease facilities, and that they did not hold themselves out to provide service to the public at large, but rather served CSPs exclusively (and in All American’s case, one CSP – Joy Enterprises – exclusively). Such finding demonstrates that the CAPs did not engage in “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . . .” (47 U.S.C. § 153 (53)), and so never acted as common carriers. CAPs deny that they are not entitled to compensation – as demonstrated in this Answer and the accompanying Brief, the CAPs caused a service to be provided to AT&T and AT&T would be unjustly enriched, and the CAPs unreasonably deprived, absent compensation. The CAPs will pursue such compensation before the SDNY Court in their pending collection action through their claim in *quantum meruit*. The *Eighth Report and Order* is not relevant precedent in support of this claim.

57. The CAPs admit that Beehive carried all traffic relevant to the case at bar, and was responsible for the routing and termination of the calls that AT&T’s customers made to chat and conference service providers. All American admits that the calls terminated at Joy Enterprises equipment located in Beehive’s facilities in Utah, not in Nevada. All American denies that this has any relevance to their claims for compensation, or to AT&T’s claims for damages. The rates that apply to the Local Switching tail circuits that CAPs caused to be provided to AT&T reflect Beehive’s tariffed rates. AT&T has at no time contested the routing or rating of Beehive’s rates, and the Commission has never analyzed them.<sup>27</sup>

58. The CAPs admit that AT&T accurately quotes the *Liability Order* in paragraph 58. The CAPs admit that AT&T took “millions of minutes” of terminating switched access service from Beehive, via the CAPs. The CAPs deny that all of these millions of minutes of switched access traffic were “billed and provided in Nevada” – AT&T’s witness Dr. David

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<sup>27</sup> 7/16/10 Stipulation #35; Liability Order, 28 FCC Rcd at 3492 ¶ 33.

Toof computed the actual minutes of switched access service terminated to AT&T by Beehive in Utah and Nevada for the years 2006 – 2008 (the period in which most of the traffic at issue was terminated for AT&T). In doing so, he used NECA minute counts for Switched Access voice service reported by Beehive. He demonstrates that the Beehive traffic was closely divided between Nevada and Utah in 2006 and 2007, and significantly divided between those two states in 2008<sup>28</sup> AT&T and the *Liability Order* relied on the *Toof Report* in the Liability Phase of this case, and AT&T is estopped from raising contrary arguments now. All American admits that the *Liability Order* found that All American violated its tariff, but because that *Order* invalidated the All American tariff *ab initio*, All American's compliance *vel non* with the tariff is irrelevant to the case at bar. All American denies that it "provided no services at all to AT&T." As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T's stipulations, pleadings and expert witness testimony demonstrate that it received switched access service, and AT&T is estopped from claiming otherwise now. The inconsistency of AT&T's position is demonstrated in paragraph 58 – in the same sentence, AT&T refers to the "millions of minutes" of traffic that was stimulated by the CAPs (indeed, that is the gravamen of its "traffic pumping" complaint), and then states that it received "no services at all." This obviously is a linguistic contortion that AT&T has attempted to invent in its vain and unlawful attempt to take the millions of minutes of terminating access service that it received over a period of years for free.

59. The CAPs admit that all of the traffic at issue was routed from AT&T to its point of termination in Beehive's facilities by Beehive. The CAPs admit that AT&T accurately cites and quotes the *Liability Order* in paragraph 59. This finding, among the other findings of the *Liability Order*, establish that the CAPs were not acting as common carriers at all times relevant

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<sup>28</sup> "MOU Data NECA Tier 2 Cost Companies 2004 – 2008", Expert Report of David. I Toof, PhD ("*Toof Report*"), dated November 11, 2009, at Exhibit DIT-8. AT&T Amended Complaint Ex. A.

to the case at bar. All American admits that it “did not have . . . an applicable access tariff because the *Liability Order* invalidated the All American federal tariff *ab initio*, but because the Commission did so in the *Liability Order*, All American’s compliance *vel non* with the tariff is irrelevant to the case at bar. All American denies that it “did not provide any services to AT&T.” As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T’s stipulations, pleadings and expert witness testimony demonstrate that it received switched access service, and AT&T is estopped from claiming otherwise now.

60. The CAPs admit that in paragraph 60 and footnote 71, AT&T accurately quotes the language from the Utah court’s Order of Referral and the *Liability Order*.

61. All American denies AT&T’s assertion in paragraph 61 that “All American did not provide any services, including any regulated services, to AT&T.” AT&T and its expert witnesses admit throughout their pleadings that AT&T received terminating switched access traffic that was caused to be delivered by All American:

- Stipulation # 52: “AT&T has not disputed the number of minutes of traffic associated with the Joy telephone numbers. (Joint Statement of Stipulated Facts, dated July 16, 2010, stamped “Filed/Accepted July 20, 2010” (“7/16/10” Stipulation)).
- The number of Local Switching MOUs billed by All American exactly matches the number of Tandem Transport Facility and Tandem Transport Termination MOUs billed by Beehive, and that AT&T paid to Beehive without complaint. *Toof Report*, Exhibit DIT-10.
- 7/16/10 Stipulation # 58: “AT&T has paid some tandem switching and transport charges to Beehive for traffic destined to the CLECs.”
- 7/16/10 Stipulation # 57: All numbers in the CAPs’ bills reflect Beehive CLLI codes.
- 7/16/10 Stipulation # 70: All CAP equipment was located in Beehive offices.

- The Toof Report is based on the assumption that “All American’s access minutes are properly attributable to Beehive . . .” *Toof Report* at 5 ¶15.
- 7/16/10 Stipulation # 35: “AT&T is not challenging Beehive’s interstate access tariff rates . . .”, also cited in *Liability Order* at 3492 ¶ 33 n.145.

And of course, the gravamen of AT&T’s Amended and Supplemental Complaints is that the CAPs caused “millions of minutes” of terminating calls for AT&T’s long distance customers.<sup>29</sup> Given these admissions – and plain common sense – AT&T is estopped from now claiming that it received no service at all. All American denies AT&T’s assertion that it provided service to either Joy or Beehive. There is no support in the record of this case for such an allegation, and AT&T cites none. AT&T’s attempt to make it appear as though the *Liability Order* made this finding is a sham – the plain language of the cited paragraph contains no such finding. It is undeniable that AT&T received millions of minutes in terminating switched access service, and that All American and the other CAPs caused it to be delivered. All American admits that its operations supported a single customer, Joy Enterprises, which confirms that All American at no time was acting as a common carrier. The CAPs deny that the findings of the Utah Public Service Commission, referenced in footnote 72, are relevant to the instant proceeding. The Utah Commission was analyzing local service, not the access service in this case, and was applying the rules of that Commission and state law. Its legal conclusions therefore are not relevant to the instant case.

62. ChaseCom and e-Pinnacle admit that the quote from the *Liability Order* in paragraph 62 is correct. This further supports the legal conclusion that, as a result of the *Liability Order*, none of the CAPs can be classified as operating as common carriers at any time relevant to this proceeding.

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<sup>29</sup> *E.g.*, Supplemental Complaint at ¶¶ 58, 59.

63. The CAPs deny that they “provided no services at all” to AT&T. As discussed in the answer to paragraph 61, and throughout this Answer and its accompanying Brief, AT&T is estopped by its prior statements, stipulations and expert witness report from making these assertions. The CAPs deny that they are not entitled to compensation. Now that the *Liability Order* has established that the CAPs never had valid tariffs, and never operated as common carriers, it is clear that they were operating in another capacity – as sales agents and billing agents – for the terminating switched access traffic that AT&T unquestionably received. In light of the Commission’s ruling, the CAPs cannot receive the compensation to which they are entitled by enforcing their tariffs, and so must pursue their alternative theory of damages in *quantum meruit*, which is pending before the SDNY Court. Failure to obtain compensation in this venue would unjustly enrich AT&T and would unreasonably diminish the CAPs. The CAPs admit that the *Eighth Report and Order* is correctly cited, but deny that that *Order* requires that AT&T receive millions of dollars worth of terminating access service, over a period of years, for free. As discussed at length in the Brief that accompanies this Answer, nothing in the *Eighth Report and Order*, or any other Commission ruling, prevents the CAPs from pursuing just compensation for the services they caused to be delivered to AT&T in their *quantum meruit* action before the SDNY Court. In fact, as discussed at length in the CAPs’ Legal Analysis In Support of the CLECs’ Answer to AT&T’s Amended Formal Complaint filed in the instant proceeding and dated June 14, 2010, at 41-48, the CAPs demonstrate that the Commission has been hearing disputes between AT&T and Beehive over access stimulation traffic to Joy Enterprises for over 15 years, and prior to the Genachowski Administration, has repeatedly denied AT&T’s oppositions to such traffic,<sup>30</sup> and has prescribed switched access rates for such traffic.<sup>31</sup>

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<sup>30</sup> *Id.* at 46-47, citing, e.g., *AT&T Corp. v. Beehive Telephone Co., Inc., and Beehive Telephone, Inc. of Nevada*, 17

64. The CAPs deny that the only way they can demand payment from AT&T from the service it admittedly took is via a tariff or negotiated contract. The gravamen of AT&T's "damages" claim is a fabricated "Catch 22" in which AT&T never has to pay for the services it took: 1) The Communications Act and Commission's rules say that common carriers may only collect access charges through tariffs or negotiated contracts. 2) The CAPs at all times relevant to this proceeding believed they had valid tariffs on file at the Commission, and relied on those tariffs to seek payment for the services that they caused to be provided to AT&T, and that AT&T as admitted receiving. 3) But, the *Liability Order* took the unprecedented (until the Genachowski Administration) step of invalidating the CAP tariffs retroactively – a full 6 years after the CAPs filed their collection action, and 8 years after they started providing service. 4) The CAPs had no contract with AT&T for their service. 5) Therefore, AT&T gets millions of terminating access minutes of service, provided over a period of years, for free. Just as AT&T claims that because the CAPs did not provide service pursuant to their tariffs, they did not provide any service at all, it argues that, because the regulated means of collecting compensation – tariffs or contracts – do not apply, then the CAPs are without any recourse at all to seek compensation. Of course, this legal theory is ludicrous – to accept it, the Commission and the SDNY Court would have to ignore the reality that AT&T has received, and benefitted from, millions of minutes of access service for which it did not pay. The Commission and Court would also have to ignore the reality that the law provides for equitable relief in cases where the absence of regulatory relief leaves a gap – that gap is filled by the Courts applying

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FCC Rcd 11641 (2002).

<sup>31</sup> *Id* at 45, citing *Beehive Tel. Co., Inc., Beehive Tel. Co., Inc. of Nevada, Tariff* FCC No. 1, PA 97-1674, Suspension Order, 12 FCC Rcd 11695 ¶ 3 (1997); *Beehive Tel. Co., Inc., Beehive Tel. Co., Inc. of Nevada, Tariff* FCC No. 1, FCC 98-83, Order on Reconsideration, 13 FCC Rcd 11795, ¶ 5 (1998), *affirmed* *Beehive Tel. Co., Inc., v. FCC*, 180 F.3d 314 (D.C. Cir. 1999).

principles of *quantum meruit*.<sup>32</sup> In the answers to the following paragraphs, and in the Brief that accompanies this Answer, the CAPs demonstrate that the Commission, the SDNY court, and courts across the country allow for equitable relief where contracts or tariffs do not apply.<sup>33</sup> The CAPs will also demonstrate that AT&T itself routinely avails itself of this legal recourse in suits against non-paying customers.

65. The CAPs admit that AT&T accurately quotes § 203 of the Communications Act in paragraph 65, but this is irrelevant to the instant case because the *Liability Order* establishes that the CAPs are not, and never were, common carriers, and so are not subject to regulation under Title II of the Communications Act, including § 203. The cases cited in footnote 73 for the proposition that carriers cannot recover damages if they do not have a valid tariff on file. Not only do the cases cited by AT&T not stand for that proposition, they fully support the CAPs' argument that, now that the *Liability Order* has retroactively invalidated the CAPs' tariffs, and because they do not have a contract with AT&T, the CAPs must proceed with their claims for damages in *quantum meruit* before the SDNY Court: In *MCI WorldCom v. PaeTec*,<sup>34</sup> the federal district court enforced the provisions of a valid tariff. In *Union Tel. v. Qwest*,<sup>35</sup> the federal district court granted summary dismissal of Union's claims based on tariff and contract, for the common-sense reason that Union admitted that it had neither a tariff nor a contract. Importantly, the court went on to hear Union's claims based in discrimination and *quantum meruit*, and denied them both on the merits.<sup>36</sup> *Union Tel. v. Qwest* does not stand for

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<sup>32</sup> *Manhattan Telecommc'ns Corp. v. Global NAPs, Inc.*, 2010 WL 1326095 (2010) at 2 ("*MetTel v. GNAPS*") equitable claims are not preempted by the Communications Act, and may fill regulatory "gaps" caused by Commission action or inaction.).

<sup>33</sup> *Advantel LLC, et al. v. AT&T Corp.*, 118 F. Supp. 2d 680, 689 (E.D. Va. 2000) (in collection action of multiple CLECs against AT&T, court granted AT&T's motion to dismiss the CLECs' quasi-contract claim, but only after determining that "[t]here is no dispute that each of the plaintiffs have a validly-filed tariff with the FCC.")

<sup>34</sup> *MCI WorldCom Network Svcs. v. PatTec Commc'ns, Inc.*, 204 Fed Appx. 271 (4<sup>th</sup> Cir. 2006).

<sup>35</sup> *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187 (10<sup>th</sup> Cir. 2007) ("*Union Tel*").

<sup>36</sup> *Id.* at 1195-97.

the proposition that the absence of a contract or tariff prohibits the hearing of a *quantum meruit* claim – it stands for the opposite. In *Hypercube v. Comtel*<sup>37</sup> the court granted summary judgment and dismissed claims made on two tariffs, because both tariffs were invalid.<sup>38</sup> The court retained jurisdiction to hear a *quantum meruit* claim made as an alternative claim by Hypercube. In doing so, the Court noted:

Even if Excel is not required to pay Hypercube pursuant to the FCC’s orders, the parties agree that if Excel constructively ordered service from Hypercube, it is obligated to pay for that service.<sup>39</sup>

*Americana Expressways, Inc.*,<sup>40</sup> is a trucking case that applies § 1312.20 of the regulations of the Surface Transportation Board. In doing so, a bankruptcy court dismissed a filed rate doctrine claim because the trucking company did not have a valid tariff. It is not clear how this case is relevant to the case at bar. With the exception of this last case, which is irrelevant, the other cases cited by AT&T actually stand for the opposite of AT&T’s asserted claim – all of these courts allowed equitable claims to be argued at court as an alternative to contract and tariff claims.

66. The CAPs admit that paragraph 66 provides a fair summary of the CLEC tariffing rules adopted in the *Eighth Report and Order*. These rules are irrelevant to the case at bar, however, because the *Liability Order* voided the CAPs’ tariffs *ab initio*, and because the CAPs are not common carriers, and so are not governed by Title II of the Communications Act. Footnote 74 is a cite and does not require a response.

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<sup>37</sup> *Hypercube LLC v. Comtel Telecom Assets LP*, 2009 WL 3075208 (N.D. Tex. Sept. 25, 2009).

<sup>38</sup> *Id.* at \*4: “Hypercube was relying on an invalid tariff, upon which it cannot file suit. To the extent Hypercube seeks to recover fees incurred between those dates via the KMC Data, LLC tariff, it cannot—as a matter of law—do so.”

<sup>39</sup> *Id.* at \*7, citing *Advantel LLC, et al. v. AT&T Corp.*, 118 F. Supp. 2d 680, 687 (E.D. Va. 2000) (discussing the requirements of a constructive ordering claim.)

<sup>40</sup> *Americana Expressways, Inc. v. Am. Pac. Wood Prods., Inc.*, 133 F.3d 752 (10<sup>th</sup> Cir. 1997).

67. The CAPs admit that paragraph 67 provides a fair summary of the Commission's tariffing rules for CLECs providing regulated services. These rules and cases are irrelevant to the case at bar, however, because the *Liability Order* voided the CAPs' tariffs *ab initio*, and because the CAPs are not common carriers, and so are not governed by Title II of the Communications Act. As discussed elsewhere in this Answer and accompanying Brief, the service taken by AT&T is terminating switched access service, provided by Beehive, and caused to be provided by the CAPs. Footnote 74 is a cite and does not require a response.

68. In paragraph 68, AT&T concludes that, because the CAPs did not follow the terms of their tariffs, the service they caused to be provided to AT&T cannot be classified as a regulated service. The CAPs deny this assertion – the traffic at issue in this case is, and always was, terminating switched access service provided by Beehive, and generated by the CAPs. In making its claims, AT&T conflates two separate issues: 1) the legal status of the CAPs and their role in generating traffic; and 2) the nature of the traffic itself. By conflating these issues, AT&T reaches the patently untrue conclusion that AT&T did not receive “any service at all” – and it has to take this position to support its argument that it should receive millions of minutes of service, over a period of years, for free. But as the CAPs have demonstrated, AT&T is estopped from arguing that it received no service – its own stipulations, testimony and expert witness report confirm that it did. See, e.g., answers to paragraphs 58 and 61 above. The *Liability Order* confirms that the traffic was provided by Beehive.<sup>41</sup> AT&T has provided no precedent, and no argument, that the service it took could be classified as anything other than switched access service, and the conclusion that the service taken by AT&T was switched access service is consistent with the only Commission decision factually identical to the case at

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<sup>41</sup> 28 FCC Rcd. at 3488 ¶ 27 and *passim*.

bar – the *Total Telecom* decision.<sup>42</sup> In that decision, the Commission found that an access stimulation-based CLEC was a “sham” and that the service was actually provided by the underlying incumbent local exchange carrier.<sup>43</sup> That case has been characterized by Judge Pauley – the judge who is hearing the SDNY Collection action and who referred the questions at issue in this proceeding to the Commission – as “determining that the proper remedy for a sham entity violation was the reasonable tariff that would be charged in the absence of a sham entity.”<sup>44</sup> The record in this case and relevant precedent therefore determine that the traffic at issue in this case is terminating switched access service. Footnote 76 is a citation and requires no response.

69. The CAPs admit the first three sentences of paragraph 69. The CAPs deny AT&T’s conclusion that Defendants did not “provide” AT&T with a regulated service – as discussed above, the record in this case demonstrates that the CAPs caused switched access service to be provided to AT&T via Beehive. The CAPs deny AT&T’s conclusion that the CAPs cannot “lawfully recover compensation” from AT&T – as discussed above, the CAPs will pursue claims in *quantum meruit* before the SDNY Court. This issue is discussed at length in the answers to the paragraphs in Section III of AT&T’s Supplemental Complaint, and in the Brief that accompanies this Answer.

70. The CAPs deny AT&T’s assertion in paragraph 70 that they are like other CLECs because the findings of the *Liability Order* establish that they are not, and never have been, common carriers or local exchange providers. The CAPs admit that they have cited to footnote 96 and the cases cited therein for the proposition that they are entitled to compensation

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<sup>42</sup> *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726 (2001), *aff’d in part, rev’d in part sub nom.*, *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003) (“*Total Telecom*”).

<sup>43</sup> *Id.* at 5742.

<sup>44</sup> AT&T Ex. 1 at 6-7 (other citations omitted).

for the switched access service that they caused to be provided to AT&T, and that AT&T admittedly took from them (and Beehive). The CAPs also cite these cases for the proposition that the Commission has already, and repeatedly, rejected the argument that is the gravamen of AT&T's "Damages" complaint – that because service was not provided pursuant to a tariff, the customer gets to take it for free. Footnote 77 is a citation and does not require an answer.

71. The CAPs admit that the *Farmers III* decision found that the incumbent LEC at issue violated its tariff in providing access stimulation service. This was the first decision under the Genachowski Administration in an access stimulation case, and the first case in the Commission's history where it invalidated a tariff retroactively, after the carrier provided millions of dollars of switched access service over a period of years. In doing so, the Genachowski Administration reversed a decision made under the Martin Administration that followed the Commission's historic practice of ordering changes to tariffs and carrier practices on a prospective basis. The CAPs admit that AT&T accurately recounts the gist of footnote 96 of the *Farmers & Merchants III* decision, and that the cited language is dicta.

72. The CAPs admit that the referenced language in the *Farmers & Merchants III* decision is dicta. The CAPs deny that the referenced language does not support a claim for CAP damages – the plain language of the footnote clearly does. Footnote 96 is quoted in its entirety and discussed in the CAPs' answer to paragraph. 39. But the CAPs want to make clear that the Commission is not deciding CAP damages in the instant proceeding, and it has no authority to do so.<sup>45</sup> This is why the CAPs filed their collection action in the SDNY Court, and not with the Commission. The CAPs deny that "they did not even provide services to AT&T" – they show throughout this Answer (*e.g.*, answer to ¶¶ 58, 61) and the accompanying Brief that

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<sup>45</sup> *E.g.*, *U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. . . .") ("*Telepacific v. Tel-America*").

this statement is belied by the record and AT&T is estopped from making this claim. The CAPs agree that the quote from the *Farmers & Merchants III* decision confirms that that order made no findings regarding damages. Indeed, while the Genachowski Administration issued several orders that retroactively voided the tariffs of local exchange carriers for access stimulation traffic, it did not conclude “liability phase” hearings in any of those cases – it left this, the first and so far only “Liability Phase” case, to the following Administration. The CAPs admit that AT&T accurately quotes the *Farmers & Merchants III* decision in stating that “a carrier may be entitled to some compensation . . . .”: This statement failed to resolve the matter, because as AT&T admits, no liability hearing was every completed in that case. But this statement *does definitively* reject AT&T’s assertion that, as a matter of law, absent a valid tariff or contract, compensation can never be enforced against a carrier that took service. Because this assertion is the foundation for AT&T’s entire “Damages” Phase complaint, the Complaint must be dismissed. Footnote 79 is a citation and requires no response.

73. The CAPs deny that the “totality of the circumstances” make clear that they are not entitled to compensation, and they will pursue their claims in *quantum meruit* before the SDNY Court. The CAPs deny that AT&T “did not provide any service” to AT&T, no matter how many times it repeats this assertion, and they show throughout this Answer (*e.g.*, answer to ¶¶ 58, 61) and the accompanying Brief that this statement is belied by the record and AT&T is estopped from making this claim. The CAPs admit that the *Liability Order* found they were not “bona fide CLECs” and were “sham CLECs” – in so finding, the *Order* establishes that the CAPs are not, and never were common carriers, and are not subject to Title II regulation. The CAPs admit that the reference to the *Liability Order’s* statement regarding \$11 million in “improper” access charges is accurate. As to the significance of this finding, it constitutes a

finding by the Commission that the services at issue are switched access services. The use of the term “improper” is never defined in the *Liability Order*, and is ambiguous. The *Liability Order* never made a finding that the Beehive rates that were charged for the \$11 million worth of terminating switched access service were unreasonable, and never conducted an inquiry into those rates. Indeed, the *Order* finds that “it is *Defendants’ conduct*, not Beehive’s rates, that is at issue.”<sup>46</sup> This finding does not support AT&T’s assertion that the CAPs are not entitled to compensation.

74. The CAPs deny that footnote 96 of *Farmers III* does not help their case – as discussed in the answer to paragraph 73, and below, this statement of the law completely undercuts AT&T’s assertion that the CAPs have no recourse for compensation outside of a tariff or contract. The CAPs admit that AT&T’s summary of the *New Valley* decisions is accurate. Footnotes 81 – 84 are citations and no response is required.

75. The CAPs admit that the *Northern Valley* case reflects facts that are different from those underlying the case at bar. The CAPs deny that these factual differences diminish the precedential value of the case as supporting the legal conclusion that the CAPs may seek compensation, even if they do not have a valid tariff or contract. In making its initial determination, the Common Carrier Bureau denied the argument that parties seeking compensation have no recourse if the tariff is not applicable. Moreover, it reached this conclusion after conducting an exhaustive review of the relevant precedent:

New Valley relies on the court’s decision in *Maislin*<sup>47</sup> to support its principal claim that it is entitled to a refund of all charges paid for the circuits at issue because PacBell’s tariff did not authorize PacBell to charge and collect for the circuits. We find no basis in *Maislin* or any other court or Commission decision for the conclusion that a customer may be exempt from paying for

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<sup>46</sup> 28 FCC Rcd at 3492 ¶ 33 (emphasis in original).

<sup>47</sup> *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 161 (1990).

services provided by a carrier if those services were not properly encompassed by the carrier's tariff.<sup>48</sup>

The CAPs deny that they “provided no service to AT&T” – they show throughout this Answer (*e.g.*, answer to ¶¶ 58, 61) and the accompanying Brief that this statement is belied by the record and AT&T is estopped from making this claim. Moreover, the CAPs deny that the service they caused to be provided to AT&T is not “functionally equivalent” to switched access service – in this Answer (*e.g.*, answer to ¶¶ 49, 56) and the accompanying Brief the CAPs demonstrate that AT&T’s expert witness, AT&T’s stipulations and pleadings, and the *Liability Order* all confirm that the service at issue is switched access service, and AT&T is estopped from asserting otherwise. The CAPs admit that the *New Valley* decisions do not involve any “sham entity” findings – but the one Commission case that does, *Total Telecom*, reaches the same conclusion as the *New Valley* decisions. The *Total* case involved the Atlas Telephone Co., an Oklahoma ILEC, which created a CLEC, Total Telecommunications Services, Inc., for the purposes of generating access stimulation traffic to Audiobridge of Oklahoma, Inc., a chat line provider. The Commission found that Atlas and Total were “intertwined,”<sup>49</sup> that “Audiobridge obtains all of its revenues from Total,”<sup>50</sup> and that “Total would pay Audiobridge commission payments of 50 to 60 percent of Total’s terminating access revenues from calls completed to Audiobridge.”<sup>51</sup> The Commission found that Total Telecom was a “sham”<sup>52</sup> AT&T, the complainant in the *Total Telecom* case, cited that case repeatedly in its Amended Complaint against the CAPs in the instant proceeding, because that case was the first and only time the Commission found a CLEC to be a “sham” entity and an alter ego of the underlying incumbent

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<sup>48</sup> *New Valley Order*, 8 FCC Rcd at 8127 ¶ 8.

<sup>49</sup> *Total Telecom*, 16 FCC Rcd at 5727 ¶ 3.

<sup>50</sup> *Id.* at 5729, ¶¶ 5, 7.

<sup>51</sup> *Id.* at 5729, ¶ 7.

<sup>52</sup> *Id.* at 5732, ¶ 14.

LEC. Yet AT&T's Supplemental Complaint for Damages does not mention the *Total Telecom* case once. The reason is that, after concluding that Total Telecom was a sham entity, the Commission found:

We reject AT&T's argument that the unlawful relationship between Atlas and Total, in and of itself, makes it unreasonable for Total to charge anything for the access services provided to AT&T. Complainants did provide a service to AT&T, *i.e.*, completing calls from AT&T's customers to Audiobridge. Moreover, AT&T recovered revenue through ordinary long-distance rates from its own customers for calls completed to Audiobridge. Finally, Complainants may not be able to recover their legitimate costs, if any, through other means, that they are entitled to recover. Therefore, Total's unlawful relationship with Atlas, standing alone, does not preclude Complainants from charging "reasonable" access charges from AT&T. \* \* \* Given the particular circumstances of this case, we conclude that a reasonable access charge is the fee that Atlas would have charged AT&T for terminating traffic directly to Audiobridge, had Total never existed.<sup>53</sup>

Therefore, while *New Valley* does not deal with a sham entity ruling, *Total Telecom* does, and reaches the same conclusion as *New Valley* – and expressly rejects AT&T's claim that no compensation was due as a result of the "sham entity" finding.<sup>54</sup> Regarding footnote 85, the CAPs deny that AT&T's assertions that the language of the CAP tariffs demonstrate that they did not provide access service is relevant – the *Liability Order* invalidated the CAP tariffs *ab initio*, and so their compliance *vel non* with the provisions of those tariffs are irrelevant. In this Answer (*e.g.*, answer to ¶¶ 49, 56) and the accompanying Brief the CAPs demonstrate that AT&T's expert witness, AT&T's stipulations and pleadings, and the *Liability Order* all confirm that the service at issue is switched access service, and AT&T is estopped from asserting otherwise. Regarding footnote 86, AT&T is estopped from claiming support from the

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<sup>53</sup> *Id.* at 5742, ¶ 37 (footnotes deleted).

<sup>54</sup> The ruling of the *Total Telecom* case was reviewed by the U.S. Court of Appeals for the District Columbia Circuit, which remanded the decision in part, ordering the Commission to expressly address AT&T's argument that neither Atlas nor Total Telecom provided it with "access service." *AT&T Corp. v. FCC*, 317 F.3d 227, 336-37 (D.C. Cir. 2003). The parties apparently settled the case, and the Commission did not issue a further order.

Commission's *Connect America Order*. In its Opposition of AT&T Corp. to Defendants' Petition for Reconsideration in the above captioned proceeding, dated May 6, 2013, at 14-15, AT&T argues that the *Connect America Order* has only prospective effect, and as such "will have no binding effect on pending complaints," including the case at bar. As the CAPs have maintained consistently since the *Connect America Order* was released, it is relevant to the case at bar, and establishes definitively that the services that the CAPs caused to be delivered to AT&T – like all access stimulation services – are switched access service.

76. The CAPs deny that they are not entitled to compensation for the services that AT&T took. Finally, since paragraphs 70-76 of the Supplemental Complaint all deal with footnote 96 of the *Farmers & Merchants III Order*, the CAPs note that AT&T has ignored the *America's Choice* case.<sup>55</sup> In that case, the Commission refused to hear a complaint that, because defendants did not have a tariff in effect, they are not obligated to pay for the services they took, because this claim was not raised in the initial complaint. Regardless, the Commission went on to state: "We note, however, that a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed."

77. The CAPs deny AT&T's assertion in paragraph 77 that "the Commission should find that the Defendants' quasi-contract claim is pre-empted by the Act and the Commission's regulatory regime. The Commission does not have the authority to tell the SDNY Court that it cannot hear the CAPs' *quantum meruit* claims, and AT&T admits this fact in its footnote 87. In the following paragraphs and in the accompanying Brief, the CAPs will demonstrate that the Commission has never held that its regulations or the Communications Act preempts carriers

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<sup>55</sup> *America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, 11 FCC Rcd 22494 22504 ¶ 24 (1996) (citing the *New Valley Order*).

without tariffs or contracts from pursuing equitable remedies in court, and in fact the Commission has found to the contrary in numerous decisions. The CAPs will also show that the SDNY Court and others fully support this conclusion, and that AT&T is estopped by its own actions from claiming otherwise.

78. The CAPs admit that their SDNY Court collection action complaint contains a claim in *quantum meruit*. This claim has merit. The CAPs deny AT&T's assertion in paragraph 78 that the Commission has found that the CAPs did not provide service to AT&T – the *Liability Order* contains no such finding, and AT&T cites to no support for its assertion. The *Eighth Report and Order* deals only with the provision of regulated services by common carriers, and does not prevent parties from pursuing equitable claims in court. Footnote 96 in *Farmers & Merchants III* expressly states that Farmers may seek compensation, despite the Commission's ruling that its tariff does not apply to access stimulation traffic at issue in its dispute with Qwest. Regarding footnote 88, the CAPs deny AT&T's assertions regarding the possible merits of their equitable claims. These are not before the Commission in the instant proceeding, as AT&T admits in footnote 87, and so are irrelevant.

79. The CAPs deny AT&T's assertion in paragraph 79 that any state law quasi-contract theory would be pre-empted. The case that AT&T cites in support for this assertion in footnote 89 – *AT&T v. FCC*<sup>56</sup> – in fact stands for the opposite. First, that court did not rule for either party in the collection dispute between Sprint PCS (which sought compensation) and AT&T (which did not want to pay), in which both parties sought review of a declaratory ruling by the Commission. The Court dismissed both parties' petitions, holding that the issues were not ripe for consideration.<sup>57</sup> But in doing so, the court made the following observations:

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<sup>56</sup> *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003).

<sup>57</sup> *Id.* at 375, 379.

While it is preferable for carriers to memorialize such contracts in a written agreement, the parties here agree that there is no written agreement or any express contract between AT&T and Sprint PCS. Nevertheless, the law recognizes – as has the Commission – that an agreement may exist even absent an express contract. \* \* \* Turning to the question whether there was such an agreement here, we believe that it is an issue that should be resolved by the Court.<sup>58</sup>

AT&T and the Commission agree on three important points: First, state courts may not determine the reasonableness of a prior rate or set a prospective charge for service. Second, state courts may determine whether the parties have in place a contract that fixes access charges. And, third, access charges may be established by an express contract or an implied-in-fact contract in which the price was already fixed (such that the state court would not inquire into the reasonableness of the rate). AT&T does not contest these points and nothing in the *Declaratory Ruling* calls these matters into question.<sup>59</sup>

In these findings, the Court makes clear that there is no automatic preemption of state law-based equitable claims. Moreover, because the Court expressly states that AT&T agrees that courts may consider such claims, AT&T is estopped from making the opposite argument in the instant proceeding.

80. The CAPs deny that state law quasi-contract claims are preempted in this case because the CAPs can only recover through tariffs or contracts. In fact, AT&T is estopped from making this argument because both AT&T Corp. and its individual incumbent local exchange carrier affiliates routinely pursue such claims in federal court. Here are some examples:

- *AT&T Corp. v. Mosaica Education, Inc., et al*, 2008 WL 2705422, \*1 (D. De., July 10, 2009) (AT&T Corp. sues under “breach of contract, tariff violation, and quantum meruit/unjust enrichment.”)
- *AT&T Corp. v. The Vialink Co.*, 2005 WL 2007102, \*1 (N.D. Tx., Dallas Div., Aug. 18, 2005) (AT&T Corp. sues under “breach of contract, claim on account, and unjust enrichment.”)
- *AT&T Corp. v. Michigan Internet Assoc., Ltd.*, 2008 WL 1766652, \*1 (E.D. Mi., Southern Div., Apr. 16, 2008) (AT&T Corp. sues under “breach of contract and quantum meruit/unjust enrichment). “To the extent that Plaintiff provided

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<sup>58</sup> *Id.* at 374 (emphasis added).

<sup>59</sup> *Id.* at 378 (emphasis added).

telecommunications services to Defendant over the years but cannot establish that these services were governed by written or oral agreements, it may seek to recover for these services under the quantum meruit/unjust enrichment theory advanced in its complaint. Moreover, it may continue to pursue this and its breach of contract theory in the alternative, so long as questions of fact remain as to whether all of the services provided by Plaintiff were covered under a contract. *Id.* at \*2 (emphasis added).

- *AT&T Corp. v. MerchantWired L.L.C.*, 2006 WL 3076671, \*1 (S.D. IN., Oct. 27, 2006) (AT&T Corp. sues under breach of contract and quantum meruit/unjust enrichment). MerchantWired claims that AT&T cannot pursue a claim for quantum meruit because AT&T is seeking to recover the same amounts for the same services it is attempting to recover under its breach of contract claim. AT&T contends that its claim for quantum is an alternative claim upon which relief could be granted in the event that the contracts relied upon by AT&T were found to be invalid. AT&T further contends that since its quantum meruit claim is an alternative claim, there is no threat of double recovery. *Id.* at \*6 (emphasis added). \* \* \* Even if an express contract exists, a plaintiff is allowed to plead a quantum meruit claim in the alternative in case the express contract is found to be invalid. *Id.* at \*7.
- *Southwestern Bell Tel. Co. v. Fitch*, 643 F. Supp. 2d 902, 905 (2009) (AT&T Texas sues under “breach of contract, *quantum meruit*, and anticipatory breach.”) “As held above, federal procedural rules permit AT&T Texas to plead in the alternative. Although a party ‘generally cannot recover under *quantum meruit* when there is a valid contract covering the services or materials furnished,’ the party ‘may, however, seek alternative relief under both contract and quasi-contract theories.’” *Id.* at 911 (citations omitted).

There are many more examples. AT&T’s argument that the *Eighth Report and Order* only allows recovery through contract or tariff, and preempts all equitable claims, if true, would surely apply to AT&T in its role as a carrier. But AT&T seeks to deny the CAPs the very relief that it routinely seeks before federal courts, demonstrating that it knows the position it is now taking before this Commission is a lie. By its actions, AT&T is estopped from making its preemption argument.

81. The CAPs agree that AT&T correctly quotes *Iowa Network Services* in paragraph 81, and agree that as a legal principal equitable relief is not available when “there is a regulatory scheme in place” that “provides a compensation mechanism.” However, by voiding the CAP tariffs *ab initio*, years after AT&T took the service, the *Liability Order* denies the CAPs any

compensation mechanism, and effectively removes them from the *Eighth Report and Order's* regulatory scheme. The *Liability Order* creates a regulatory gap that must be filled by courts using equitable principals.<sup>60</sup> This is why the federal rules expressly allow parties to plead claims in equity alongside claims in tariff or contract, as each of the cases in the answer to paragraph 80 above, attest. The CAPs deny that the Communications Act and the Commission's rules hold that a carrier may recover, if at all, only by tariff or contract. The "if at all" language was inserted by AT&T – the sources of authority AT&T cites do not require a party to provide service to another without compensation, nor could they. The CAPs deny that equitable claims would "displace the federal regulatory regime" – by voiding the CAP tariffs ab initio, and making findings that clarify that the CAPs are not, and never were, common carriers, the *Liability Order* has removed the CAPs from any applicable regulatory regime. Regarding the cases cited in footnote 90, all confirmed that regulatory relief remained available to the affected parties: *Iowa Network Services* held that: "In the present case, the [Iowa Utilities] Board determined INS should seek compensation from the originating third-party wireless carriers through a negotiated (or Board arbitrated) interconnection agreement, and that any such agreement would apply retroactively."<sup>61</sup> *Iowa Network Services* was subsequently followed by the District of South Dakota in *Northern Valley v. Qwest*.<sup>62</sup> In that case, the court found that the filed rate doctrine would preempt equitable claims only if the court found that the tariff applied, and relief was available under the tariff:

It is crucial to note, however, that this is all the tariff governs. In order for the filed rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff. \* \* \* The antidiscrimination policy [of the filed rate doctrine] applies to ensure that purchasers of services

<sup>60</sup> *E.g., MetTel v. GNAPS*, 2010 WL 1326095 (2010) at 2.

<sup>61</sup> *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2<sup>nd</sup> 850, 905 (S.D. IA 2005).

<sup>62</sup> *Northern Valley Comm's, LLC v. Qwest Comm's Corp.*, 659 F. Supp. 2d 1062 (D.S.D. 2009).

covered by the tariff will pay the same rate. The policy does not per se extend to services not covered by the tariffs.<sup>63</sup>

Where, as here, it is alleged that the charges as set out in Northern Valley's tariffs do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.<sup>64</sup>

The *Union Tel* case is discussed in the answer to paragraph 65 above, and involves a court enforcing the provisions of a valid tariff. AT&T fares better with two cases – *Connect Insured*<sup>65</sup> and *XChange Telecom*.<sup>66</sup> In the former case, the court adopted the argument AT&T makes in its Supplemental Complaint – that equitable claims are barred by the FCC tariff and contract-based regulatory scheme. In the latter case, the court found that equitable claims are barred by the Filed Rate Doctrine, and argument that AT&T does not make. These cases are wrongly decided, and cannot stand against the weight of the *New Valley decisions*, *America's Choice*, *Iowa Network Services*, *Northern Valley*, *MetTel v. GNAPs*, and the five cases cited in the answer to paragraph 80. Indeed, the *Connect Insured* and *XChange Telecom* Courts cited cases like *Iowa Network Services* for support, showing that they clearly misunderstood the precedent. Significantly, the *MetTel v. GNAPs* court noted the minority of contrary rulings when it issued its decision. That court found that the MetTel tariff did not apply to the traffic at issue, but denied GNAPS' motion to dismiss MetTel's equitable claims, and awarded MetTel equitable relief. In so doing, the court stated:

Global contends, both in its summary judgment papers and again in its post-trial briefing, that this state law claim is preempted by the federal tariff regime. The tension inherent in Global's position is obvious: defendant contends that it is not subject to MetTel's filed tariff rates, while arguing that the statutory rate system precludes the unjust enrichment claims. The Court rejects Global's contention as

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<sup>63</sup> *Id.* at 1068.

<sup>64</sup> *Id.* at 1070 citing *Iowa Network Services*, 466 F.3d at 1097.

<sup>65</sup> *Connect Insured Telephone, Inc. v. Qwest Long Distance*, 2012 WL 2995063 (N.D. TX., July 23, 2012).

<sup>66</sup> *XChange Telecom Corp., v. Sprint Spectrum, L.P.*, 2014 WL 4637042, N.D.N.Y., Sept. 16, 2014).

legally unsupported. \* \* \* Although Global cites to various cases in which other courts have held that unjust enrichment claims are barred pursuant to the filed rate doctrine, those cases are not binding on this Court and, in any event, given the state of the legal landscape, their analyses as to the implications of the filed rate doctrine are not persuasive to this Court in evaluating the instant facts.<sup>67</sup>

82. The CAPs admit that AT&T correctly summarizes the regulatory structure established in the *CLEC Access Charge Reform Order* in paragraph 82. The CAPs deny that this regulatory scheme precludes equitable relief. The reference to *Qwest Commcn's Co. LLC v. Northern Valley Commcn's, LLC*<sup>68</sup> is misplaced, however – that order does not discuss *quantum meruit*, quasi-contract, or any other form of equitable relief, much less preempt them. In fact, the Commission has never made such a finding in any access stimulation case, because the instant case is the first one that has progressed to the “damages” phase. AT&T admits this in footnote 94 to of its Supplemental Complaint: “To be sure, the Commission has not yet ruled in a specific case whether traffic pumping LECs can recover alternative compensation, or, if so, to what extent.” As discussed in the answer to the preceding paragraph, *Connect Insured* is demonstrably wrongly decided.

83. The CAPs deny that equitable relief is barred to them, for reasons discussed above in this Answer and in the accompanying Brief. The CAPs admit that AT&T correctly quotes from the *Iowa Network Services* decision, but as the CAPs demonstrate in their answer to paragraph 81, that decision only denied equitable claims after finding that a regulatory alternative – arbitration conducted before the Iowa Utilities Board, which would have retroactive effect – was available to the parties. That case does not support AT&T's claims here, which would deny the CAPs any recourse after the *Liability Order* invalidated their tariffs retroactively. The CAPs have already demonstrated that AT&T v. FCC does not support

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<sup>67</sup> 2010 WL 1326095 at 3, citing *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998) (emphasis added)..

<sup>68</sup> 26 FCC Rcd 8332 (2011).

AT&T's argument. In their answer to paragraph 79, the CAPs quote the plain language from that decision, which demonstrates that it supports the CAPs' pursuit of equitable relief from the SDNY Court. Regarding footnote 91: The CAPs have already demonstrated that *Marcus v. AT&T* does not support AT&T's argument – in fact it was cited as support by the *MetTel v. GNAPS* court in reaching the opposite conclusion. See discussion in answer to paragraph 82 and CAP footnote 72. *PaeTec v. CommPartners*<sup>69</sup> also does not support AT&T's assertion. That court did find that the PaeTec access tariff did not apply, and did bar equitable claims, but only after finding that the intercarrier compensation provisions of § 251 of the Communications Act apply to the dispute: "My decision turns only on § 251."<sup>70</sup> That decision resolved the liability phase of the case, and the subsequent damages phase would determine the amounts of compensation available to the plaintiff.<sup>71</sup> *Alliance v. Global Crossing*<sup>72</sup> is irrelevant to the instant case because equitable claims were dismissed only after the court found that valid tariffs were in effect, and governed the rights and responsibilities of the parties: "There is no dispute that plaintiffs operated under valid tariffs."<sup>73</sup> *Advantel v. AT&T* is discussed and quoted in the CAP footnotes 36 and 42, which demonstrate that the court only dismissed equitable claims after finding that a valid tariff was in force. In *Brandenberg v. Sprint*<sup>74</sup>, equitable claims were dismissed, but both parties and the court acknowledged that a valid tariff was in place and governed the rights and responsibilities of the parties, and so that case is not relevant to the case at bar. Finally, the *WorldCom v. PaeTec* case is discussed in the CAPs' answer to paragraph 36, and the carrier at issue was a CLEC with a valid tariff. In short – all of the cases cited in

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<sup>69</sup> *PaeTec Commc'ns Inc. v. CommPartners, LLC*, 2010 WL 1767193 (D.D.C. Feb. 18, 2010).

<sup>70</sup> *Id.* at \*4.

<sup>71</sup> *Id.* at \*5.

<sup>72</sup> *Alliance Commc'ns Coop., Inc. v. Global Crossing Telecomms., Inc.*, 663 F. Supp. 2d 807 (D.S.D. 2009).

<sup>73</sup> *Id.* at 819.

<sup>74</sup> *Brandenberg Tel. Co. v. Sprint Commc'ns Inc.*, 2010 WL 881735 (W.D. Ky. Mar. 4, 2010).

asserted support of AT&T's argument had valid tariffs in place. As a result, none of those cases involved the same regulatory "gap" that is involved in this case by effect of the *Liability Order*. The CAPs fully acknowledge that equitable claims cannot be pursued when a valid tariff or contract is in place. Unfortunately, given the ruling in the *Liability Order*, that is not the case in the instant proceeding. Footnote 92 is a citation and does not require a response.

84. The CAPs deny that "mileage pumping" has anything to do with this case – the only traffic at issue are Local Switching "tail circuits" of calls routed by AT&T to Beehive. The *Jefferson* decision was part of a series of three cases, all decided under the Powell Administration during 2001 and 2002, in which the Commission rejected AT&T's arguments that it was not obligated to pay access charges for access stimulation services.<sup>75</sup> Those cases stand for the proposition that access stimulation traffic is switched access traffic, properly tariffed, and charged at switched access rates. That fact is confirmed in the *Connect America Order*,<sup>76</sup> in which the Commission adopted rules that confirmed that access stimulation was switched access, properly tariffed, and charged at a new category of lower switched access rates that the Commission put into effect on a prospective basis.<sup>77</sup> Under the Genachowski Administration, the *Liability Order* dismissed the CAPs' reliance on these cases,<sup>78</sup> invalidated their tariffs *ab initio*, and found that they were not operating as "bona fide CLECs." The result of these findings is that the CAPs are not, and never were, common carriers, and are not subject to Title II regulation. Footnote 93 is a citation, and does not require a response.

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<sup>75</sup> Legal analysis in support of the CLECs' Answer to AT&T's Amended Formal Complaint, dated June 14, 2010, at 15 nn. 27 & 28, citing *AT&T Corp. v. Jefferson Tel.*, E-97-07, 16 FCC Rcd. 16130, 16130 (2001), *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641 (2002), and *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002).

<sup>76</sup> *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Connect America Order*").

<sup>77</sup> *Id.* at 17874-890 ¶¶ 656-701.

<sup>78</sup> 28 FCC Rcd at 3492 ¶ 33.

85. The CAPs admit that AT&T accurately describes the Commission’s findings in its Farmers & Merchants decisions. The CAPs admit that Farmers argued on appeal that the access stimulation service it provided was not a “common carrier” service, and that the D.C. Circuit Court of Appeals rejected that argument. Those decisions have no bearing on the common carrier status of the CAPs, however. The Commission has never found any CLEC to be a “sham,” other than Total Telecom and the CAPs, and never made such a finding against Farmers. In addition, the Farmers assertion of non-common carrier status, and the court’s rejection of that argument, were both summary statements, made without discussion or support. In contrast, the CAPs have laid out in their Petition for Reconsideration and Clarification of the *Liability Order*<sup>79</sup> the multiple reasons the *Liability Order* confirms they are not common carriers, fully supported and in substantial detail. The CAPs explain in detail why, as a result of the *Liability Order*, they are not subject to Title II regulation. The Commission has not responded to these arguments, and the CAPs repeat them in the Brief that accompanies this Answer.

86. The CAPs admit that AT&T accurately describes the Commission’s findings in its *Northern Valley* orders, but deny that these findings have any relevance to the regulatory classification of the CAPs. The Commission found that the CAPs were not “bona fide CLECs” and invalidated their tariffs *ab initio*. In doing so, they removed the CAPs from the CLEC regulatory regime for all periods relevant to the instant proceeding. The CAPs deny that the “functional equivalent” findings of the *Northern Valley* orders have anything to do with the case at bar. As discussed in the CAPs’ answer to paragraph 75, AT&T is estopped from arguing that the services that the CAPs caused to be provided to AT&T are anything but switched access

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<sup>79</sup> Petition for Reconsideration and Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom, filed in the instant docketed proceeding and dated April 24, 2013, at \_\_\_\_\_.

service. The services at issue are the Local Switching “tail circuit” of Beehive terminating switched access service, charged at the same rates listed in the Beehive tariff. The CAPs agree that, both subsequent to the adoption of the *Connect America Order*, and prior to it, access stimulation services are, and always have been, switched access services. The CAPs deny that this reality has any bearing on their regulatory classification – the CAPs are not common carriers because the *Liability Order* found they were not “bona fide CLECs” and invalidated their tariffs retroactively. The CAPs note that AT&T’s statement in this paragraph 86 constitutes an admission by AT&T that the service that the CAPs caused to be provided to AT&T is switched access service, and must be compensated at the applicable tariffed switched access rates that applied at the time the service was provided. Those rates are the Beehive tariffed rates, which AT&T has never contested, and which AT&T is obligated to pay pursuant to its settlement agreement with Beehive. The CAPs deny AT&T’s assertion that there is no regulatory “gap” in the regulatory system that applies to the services at issue. The *Liability Order* created the regulatory gap when it invalidated the CLEC tariffs retroactively, years after they caused millions of minutes of terminating switched access service to be provided to AT&T. Regarding footnote 94, the CAPs agree that the Commission “has not yet ruled in a specific case whether traffic pumping LECs can recover alternative compensation, or if so, to what extent.” From past Commission decisions, it appears that the Commission is unable to do so. The Commission has long held that it is not a collection agent for carriers against customers,<sup>80</sup> and courts have held that the Commission does not have authority to adjudicate a carrier’s rights against its customers.<sup>81</sup> Under this line of decisions, it appears that the

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<sup>80</sup> *E.g., Telepacific v. Tel-America*, 19 FCC Rcd 24552 (2004) (“the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges”).

<sup>81</sup> *All American Tel. Co. et al. v. AT&T*, 26 FCC Rcd 723 (2011) (IXC acting as a customer cannot violate the Communications Act, and so is not subject to § 208 complaints); *AT&T Corp. et al. v. Bell Atlantic-Pennsylvania*,

Commission does not have authority to name the amount of damages that the CAPs may receive from AT&T. Rather, that determination must be made by the SDNY Court. The CAPs deny AT&T's assertion that the *MetTel v. GNAPs* decision does not apply in this case because there is no "regulatory gap." As the CAPs have demonstrated, by invalidating their tariffs retroactively, the *Liability Order* created precisely the type of regulatory gap that the *MetTel* court addressed, and committed to fill. In doing so, the *Liability Order* removed the CAPs from the regulatory regime, and the CAPs have no recourse absent pursuing their claims in *quantum meruit* before the SDNY Court.

87. The CAPs deny that their pursuit of *quantum meruit* claims before the SDNY Court would "undermine the administration of the [Communications] Act, and they deny that the *PaeTec v. CommPartners* case so holds. The CAPs discuss that case in their answer to paragraph 83, and demonstrate that the court only dismissed equitable claims after it determined that the intercarrier compensation provisions of § 251 of the Communications Act applied, and that the parties had recourse to that regulatory regime. In contrast, the *Liability Order* invalidated the CAPs' tariffs de novo, and made findings that lead to the conclusion that the CAPs are not, and never were, common carriers. Therefore, Title II regulation does not apply to them and they have no recourse under the Commission's regulatory regime. The CAPs deny AT&T's claim that the uniform standard for rates for service would be undermined if the CAPs pursue their *quantum meruit* claims. As the CAPs argued in their pleadings in the Liability Phase of this proceeding, the best way to guarantee uniformity in service rates would be to uphold the CAPs' tariffs and enforce the Filed Rate Doctrine, which has been guaranteeing rate uniformity for about a century. Unfortunately, the *Liability Order* ignored this common sense

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*et al.*, 14 FCC Rcd 556, 559 ¶ 98 & n. 240, citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1419 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1240 (1996) (Commission cannot consider offsets from customer in awarding damages against a carrier, because it has no authority to assess damages against non-carriers).

argument. Nevertheless, the CAPs have demonstrated that, no matter what legal theory is employed, only one rate can apply to the traffic at issue – the Beehive tariffed rates for Local Switching in effect at the time the service was provided. The CAPs demonstrated that this would be the outcome if the *Total Telecom* case applied, and the Commission found the CAPs to be “shams,” which it did. Under *Total Telecom*, the Commission found that the tariffed rates of the underlying incumbent LEC applied, which common-sense rationale would require the Beehive rates apply in this case. Moreover, when courts consider *quantum meruit* claims, they avoid judicial ratemaking by applying the prevailing rates for the same service in the same area – which in this case is the Beehive tariffed Local Switching rates.<sup>82</sup> And this outcome is also required by the settlement agreement that AT&T had with Beehive, and that was operative at all times relevant to the instant case.<sup>83</sup> In all cases, there is only one rate that can apply to the traffic at issue in this proceeding. The CAPs deny that their recourse to equitable relief at court will create a new paradigm in which “any carrier could effectively deregulate itself” – to get to where we are today, we are 7 years after the CAPs filed their SDNY collection action, AT&T has driven all three CAPs out of business by imposing a crushing legal burden on them, the Genachowski Administration made a series of extremely unfortunate choices by ignoring decades of precedent and invalidating the tariffs of numerous LECs retroactively, without ever resolving the ultimate dispute between the LECs and the IXC. It is unlikely that this course will be taken up by other carriers as an attractive business plan. It is also highly unlikely that this Commission will see leadership that demonstrates such an insouciant disregard for established precedent, its statutory obligation to resolve disputes in a timely manner, its own rules governing how to provide timely guidance to courts that have issued primary jurisdiction

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<sup>82</sup> Legal Analysis in Support of the CLECs’ Answer to AT&T’s Amended Formal Complaint, filed in the instant proceeding and dated June 14, 2010, at 41-48.

<sup>83</sup> See discussion in the Brief being filed with this Answer.

referrals, and plain common sense, as has been demonstrated in the *Liability Order*. The CAPs deny that AT&T's reference to the tariffing requirements of § 203 of the Act as only being susceptible to change by Congress is relevant to this case. The *Liability Order* invalidated the CAPs' tariffs retroactively, and reached conclusions that have the effect of classifying the CAPs as non-common carriers. The regulatory requirements of Title II do not apply to them.

88. The CAPs deny AT&T's assertions that the Commission can pre-empt the Court's authority to hear the CAPs' claims in equity, stated in paragraph 88 and footnote 96. AT&T cites no authority for this proposition, and none exists. Indeed, the Commission lacks authority to hear CAPs claims for damages against AT&T, as a non-carrier, in any event.<sup>84</sup> AT&T does not even try to explain how the Commission can exercise pre-emption in an area where it has no statutory authority. To the extent AT&T has arguments for the SDNY court, it should make them there, and not in this proceeding.

89. The CAPs deny that the *Liability Order* ever found that the CAPs "provided no services to AT&T." The CAPs have discussed earlier in this Answer and in the accompanying Brief that AT&T is estopped from making this assertion by its earlier stipulations and pleadings, its expert witness testimony, and its settlement agreement with Beehive. AT&T's assertion that "any services they [the CAPs] did provide are pre-empted by the Act and the Commission's rules" simply makes no sense, and the CAPs are unable to respond to it.

90. The CAPs admit that AT&T correctly quotes Referral Issue 5 in paragraph 90.

91. The CAPs admit that AT&T correctly quotes Referral Issue 5a in paragraph 91.

92. The CAPs admit AT&T's assertion that the Commission need not consider whether the rates in the CAP tariffs, which mirror the rates in the Beehive tariff, were

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<sup>84</sup> E.g., *Telepacific v. Tel-America*, 19 FCC Rcd 24552 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges").

“presumed to be just and reasonable,” because AT&T is estopped from asserting otherwise. As demonstrated in the CAPs’ answer to paragraph 61, AT&T has stipulated that it is not contesting the Beehive rates, and the *Toof Report* confirms that the MOUs reflected in the invoices are accurate. And paragraph 33 and footnote 145 of the *Liability Order* confirm that Beehive’s rates are not at issue. AT&T is therefore estopped from contesting the reasonableness of the rates now, and this matter cannot be factored into its asserted claims for damages. The CAPs deny that the issue whether or not they were “competing” with Beehive is irrelevant to the Damages Phase of this proceeding.

93. The CAPs admit that AT&T correctly quotes Referral Issues 5c and 5d.

94. The CAPs deny that these referred issues have “no bearing” on the other referred issues. Referred issues 5a and 5d go to uniformity of rates for the same service, which is the sole focus of tariffs, the Commission’s rate prescription authority, and the Filed Rate Doctrine. Just seven paragraphs earlier, in paragraph 87, AT&T expresses its despair that the CAPs’ recourse to equitable relief would disrupt the “uniform federal standard in the Communications Act.” Now it should not be heard to argue that questions regarding rate uniformity “have no bearing” on the guidance this Commission is obligated to provide to the SDNY Court. The CAPs deny AT&T’s assertion in paragraph 94 that there is no record in the proceeding of different LECs charging different rates for the same service, or the same LEC charging different customers different rates for the same service. The CAPs have made it abundantly clear in their filings that, whether their tariffs apply or not, there is no rate other than the Beehive tariffed rate (Legal Analysis in Support of the CLECs’ Answer to AT&T’s Amended Formal Complaint, filed in the instant docketed proceeding and dated June 14, 2010, at 41-48), which AT&T admits the CAPs matched in their invoices (7/16/10 stipulation # 45). Should AT&T be

awarded a rate of “zero” for the Local Switching services that were provided to it by Beehive, through the agency of the CAPs, the CAPs, which believed themselves to be CLECs at the time, would charge a different rate than the Beehive ILEC for the same service in the same territories. Conversely, because the *Liability Order*’s “sham” decision effectively confirms that Beehive was the service provider, consistent with the Commission’s *Total Telecom* decision, AT&T would receive Local Switching at a rate of “zero” while Beehive’s other customers paid the full Beehive filed tariff rate. This outcome would upset the “uniform federal standard” that was disrupted when the *Liability Order* invalidated the CAP tariffs retroactively. That balance can be restored if this Commission advises the SDNY Court of the importance of rate uniformity in its responses to Referral Issues 5c and 5d, so that the SDNY Court can award the proper level of damages in response to the CAPs’ claims of quantum meruit and quasi-contract.

95. The CAPs deny that awarding AT&T a rate of “zero” would be appropriate. Such a rate would unreasonably discriminate in favor of AT&T, would unjustly enrich AT&T and would unreasonably diminish the CAPs. The CAPs deny that the existence of competition *vel non* between the CAPs and Beehive is relevant to the instant case, in which the Commission must respond to the SDNY Court’s referrals. The CAPs agree that the Commission’s *Connect America Order* closed an arbitrage loophole that existed in the Commission’s access charge rules as they applied to CLECs. That Order closed the loophole consistent with decades of Commission precedent, by effecting prospective changes in the rules, and requiring uniform changes in tariffed rates so that no customer would receive discriminatorily favored rates. This uniformity was ignored by the Genachowski Administration took the unprecedented step of invalidating the tariffs of numerous parties retroactively, thereby creating unreasonably discriminatory effects that remain unresolved to date. Footnote 97 is a citation that does not

require a response. Regarding footnote 98, the CAPs agree that the Commission's rules allow CLECs to charge rates lower than the ILEC benchmark rates, but there is no evidence on the record of this proceeding whether, or to what extent, CLECs have done so. The CAPs admit that AT&T accurately quotes the *CLEC Access Charge Reform Order*.

96. The CAPs admit that AT&T accurately quotes their March 19 Statement. The CAPs admit that it is "generally unobjectionable" that carriers collect the same rates from different customers for the same service, in fact the 100-year old history of the Filed Rate Doctrine demonstrates that the Commission and the courts find such absence of unreasonable discrimination more than "unobjectionable" – they find it to be a critical policy objective, mandated by the Communications Act. The CAPs deny that AT&T is not subject to damages under the CAPs' *quantum meruit* claim pending before the SDNY Court. Moreover, the CAPs note that the Commission has neither the inclination nor the authority to set damages for the CAPs in the case at bar, which is why the CAPs brought their collection action before the SDNY Court in the first instance. The CAPs deny that the nondiscrimination provisions of the Communications Act and the Filed Rate Doctrine are not relevant to the instant proceeding, and the CAPs believe that the Commission can advise the SDNY Court that it could avoid such unreasonable discrimination by awarding the Beehive tariffed rate as the appropriate measure of *quantum meruit* damages. The CAPs admit that AT&T's proposal to force the CAPs to provide service for free to all long distance carriers would be one way to avoid unreasonable discrimination in AT&T's favor, but the CAPs deny that such an outcome is achievable, given the restrictions of the 5<sup>th</sup> Amendment's prohibition on uncompensated takings, and the statute of limitations.

97. The CAPs admit that AT&T correctly quotes Referral Issue 5e.

98. The CAPs deny that they “did not provide any services to AT&T.” As discussed at length earlier in this Answer, AT&T cynically takes the *Liability Order*’s finding that the CAPs did not provide service “pursuant to their tariffs” and asserts that it never received any service at all, which simply disregards reality. As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T is estopped by its stipulations, pleadings, expert testimony, and the findings of the *Liability Order* from pursuing this argument. The CAPs admit that the access stimulation services that AT&T took are switched access services, and that the *Farmers* and *Jefferson Tel.* cases support this conclusion, as does the *Connect America Order*. The CAPs admit that it is an “indisputable fact” that the service that AT&T took in this case is terminating Switched Access Service. The CAPs agree that this finding should be part of the Commission’s response to Referral Issues 2 and 3, but deny that this would be a complete response. The complete response should include an affirmation that, in light of the ruling in the *Liability Order*, the service was actually provided by Beehive, through the agency of the CAPs, consistent with the Commission’s finding in the *Total Telecom* case. The CAPs deny AT&T’s assertion that it is “not necessary for the Commission to classify any services the Defendants might have provided” – the Court expressly referred this question, and the clarification that the millions of minutes of service that AT&T took are terminating switched access service, provided by Beehive, is important to the SDNY Court’s determination of the damages that the CAPs are due pursuant to their equitable claims. The CAPs deny AT&T’s assertion that the CAPs are “not entitled to compensation,” and the Commission is without authority to make such a determination – it lacks authority to award damages from customers to their carriers. It is the SDNY Court that will determine the damages to which the CAPs are entitled. The CAPs admit that the *Liability Order* found that they were operating as sham CLECs, but deny that the

access charges they invoiced to AT&T were unreasonable. The CAPs have demonstrated in their previous filings (*e.g.*, Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant docketed proceeding and dated June 14, 2010, at 41-48), and in this Answer and accompanying Brief, that the Beehive tariffed Local Switching rates are the only rates that can apply to the traffic that AT&T admittedly took, that such a finding is compelled by the *Total Telecom* decision (answer to paragraph 68), and that AT&T is estopped from contesting the applicability of the Beehive rates (answer to paragraph 61 and *passim*).

**COUNT I**  
**DIRECT DAMAGES OF PAYMENTS TO THE DEFENDANTS**

99. Paragraph 99 does not require a response.

100. The CAPs admit that paragraph 100 is an accurate summary of the findings of the *Liability Order*.

101. All American admits it received \$249,014.60 in payment from AT&T.

102. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 101. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

103. e-Pinnacle admits it received \$3,145.36 in payment from AT&T.

104. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 103. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and

would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

105. ChaseCom admits it received \$336.41 in payment from AT&T.

106. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 105. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

107. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

108. The CAPs are not allowed under the Commission's rules to seek offset in the instant proceeding. 47 C.F.R. § 1.722(i)(4). The Commission is prohibited from considering offsets from non-carriers in damage awards.<sup>85</sup>

109. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that they are not entitled to compensation (answer to paragraph 63 and *passim*), or that AT&T is entitled to any damages (answer to paragraph 6 and *passim*).

110. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that their

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<sup>85</sup> *AT&T Corp. et al. v. Bell Atlantic-Pennsylvania, et al.*, 14 FCC Rcd 556, 559 ¶ 98 & n. 240, citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1419 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1240 (1996) (Commission cannot consider offsets from customer in awarding damages against a carrier, because it has no authority to assess damages against non-carriers).

equitably claims against AT&T, now pending in the SDNY court, are pre-empted by any federal regulatory regime. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*.

111. The CAPs deny that AT&T is entitled to a remand of the amount claimed. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and the CAPs unreasonably diminished – should AT&T be awarded a refund.

## **COUNT II DAMAGES FOR PAYMENTS TO BEEHIVE**

112. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

113. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

114. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

115. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

116. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

117. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

118. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

119. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling*.

### **COUNT III OTHER REFERRED ISSUES**

120. Paragraph 120 does not require a response.

121. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that they are not entitled to compensation (answer to paragraph 63 and *passim*).

122. The CAPs deny that the only way they can be compensated for the service that AT&T took is by tariff or express contract, and that they are precluded from seeking damages in equity from the SDNY Court. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*.

123. The CAPs admit that, because the *Liability Order* invalidated their tariffs retroactively, they did not have an applicable tariff on file, or an express contract with AT&T.

124. The CAPs deny that they are precluded from seeking damages in equity from the SDNY Court. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*.

125. The CAPs deny that the Beehive tariffed rates are irrelevant to the case at bar or to the Commission's response to the SDNY Court's Referral Issues. The Beehive tariffed rates are the only rates that can apply to the traffic at issue in this proceeding. Answer to paragraph 98 and *passim*.

126. The CAPs deny that considerations of unreasonable discrimination are irrelevant to the case at bar, or to the Commission's response to the SDNY Court's referral issues. Answers to paragraphs 95 and 96, and *passim*.

127. The CAPs deny that they are common carriers. The findings of the Liability Order establish that they are not. Answer to paragraph 17 and *passim*. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that the Commission should ignore the SDNY Court's Referral Issues regarding the classification of the service that AT&T took. Such classification is important to the Court in evaluating the CAPs' equitable claims for damages. Answer to paragraph 98. The CAPs agree that the services that AT&T took can only be classified as switched access service, and have shown that the Commission's *Total Telecom* and *Connect America* orders require such a finding. Answer to paragraph 56 and *passim*.

128. The CAPs deny that AT&T is entitled to any damages. Answer to paragraph 36 and *passim*.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

(Wrong Venue under 47 U.S.C. § 207)

In its answer and counterclaims to the collection action filed by All American, e-Pinnacle and ChaseCom in the Southern District of New York, AT&T seeks damages against them. In making this claim, AT&T selected the venue for pursuing its damage claims against those parties, and is prohibited under 47 U.S.C. § 207 from seeking damage awards from this Commission. See accompanying Brief at 5-7.

#### **SECOND AFFIRMATIVE DEFENSE**

(Lack of Jurisdiction; Failure to State Justiciable Claim)

AT&T's Supplemental Complaint for Damages fails to state a claim against Defendants upon which relief can be granted. The *Liability Order* establishes that the CAPs are not common carriers – and never were – and so the Commission lacks jurisdiction to adjudicate

claims against them. Also, because they are not common carriers, the CAPs are not subject to the rate regulation and rate prescription requirements of §§ 201-204, or the formal complaint requirements of § 208, or the damages provisions of §§ 207 and 209 of the Communications Act. See accompanying Brief at 7-8.

**THIRD AFFIRMATIVE DEFENSE**  
(Judicial Estoppel Based on Settlement Agreement)

At all times relevant to this case, the rates for all AT&T calls carried by Beehive (which includes all Defendant traffic at issue in this case) were governed by a settlement agreement executed by AT&T and Beehive on August 20, 2007. A copy of that agreement is appended to the Brief that accompanies this Answer at CAP Confidential Exhibit B. Under that agreement, AT&T agreed to pay, and did pay, Beehives' tariffed rates, and is estopped from claiming that any other rates apply to the traffic at issue in the instant case. See accompanying Brief at 8-10.

**FOURTH AFFIRMATIVE DEFENSE**  
(Judicial Estoppel Based on Stipulations, Pleadings,  
Expert Witness Testimony and Unrelated Court Actions)

In the "Liability Phase" of the instant proceeding, AT&T stipulated that Defendants terminated, or caused to be terminated, the calls that AT&T sent to them; that the Defendants' invoiced access charges that matched Beehives' tariffed access charges; and that AT&T is not contesting Beehive's rates. AT&T is estopped from now asserting that it did not receive termination service from Defendants, or that any rate other than the Beehive rate is applicable to that traffic. See accompanying Brief at 12-13.

**FIFTH AFFIRMATIVE DEFENSE**  
(Uncompensated Taking Under the Fifth Amendment)

By the Commission's rules and orders, both the CAPs and AT&T were prohibited from blocking the traffic at issue. Under the Genachowski Administration, the Commission took the

unprecedented step of refusing All American to amend its tariff, and forced it to re-file its old tariff, which the Commission later voided *ab initio* on the basis of the language that All American tried to change. The Genachowski Administration ignored or denied three All American petitions for declaratory ruling, which sought timely resolution of the dispute between the CAPs and AT&T for almost five years. By these actions, the Commission required the CAPs to provide, or to cause Beehive to provide, service to AT&T. Should the Commission grant the relief sought by AT&T – essentially setting a rate of zero for the service that AT&T admittedly took – such a ruling would be an uncompensated taking, in violation of the Fifth Amendment of the Constitution, and so is disallowed. See accompanying Brief at 17-18.

**SIXTH AFFIRMATIVE DEFENSE**  
(Unjust Enrichment)

AT&T received payment from its end user customers, call aggregators, and least-cost-routing customers for every call terminated, or caused to be terminated, by Defendants. The Commission has recognized in its *Farmers & Merchants* and *Total Telecom* decisions that this is a significant value, for which the service providers require compensation. Forcing the CAPs to provide termination service to AT&T for free would unjustly enrich AT&T and unreasonably diminish the CAPs. The CAPs note that this is an equitable argument that involves an award of damages to them, and that the Commission cannot provide such relief. However, the prima facie showing of unjust enrichment is enough to dismiss the damage claims of AT&T. See accompanying Brief at 17.

**SEVENTH AFFIRMATIVE DEFENSE**  
(Failure to Meet Burden of Proof)

AT&T does not even attempt to make a factual showing that it has been harmed by the CAPs' actions such that it merits damages. Rather, it merely advances a flawed and demonstrably wrong legal argument that the CAPs cannot force it to pay for the services it took. This does not meet the rigorous standard for demonstrating damages that the Commission's rules require. Also, in the "Liability Phase" of the instant proceeding, AT&T's expert witness David Toof asserted that, under his calculations, the "cost-based" rates for the AT&T traffic terminated by Defendants should be 0.2 cents or 0.3 cents. Defendants have demonstrated that these calculations are wrong. Nevertheless, on the basis of its expert's prior testimony, AT&T's pleadings, and the finding in the *Liability Order* that Beehive's rates are not at issue, AT&T is now estopped from claiming that the rate that should apply to the traffic at issue is zero. See accompanying Brief at 15-17.

## INFORMATION DESIGNATION

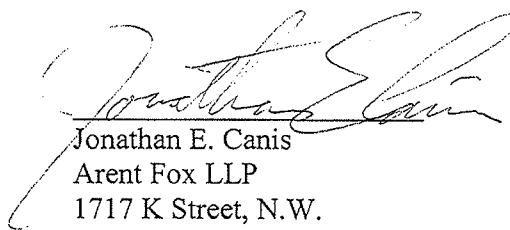
There is no change to the Information Designation originally made by the CAPs in the Answer of All American Telephone Co., e-Pinnacle Communications, Inc. and Chasecom, filed in the instant docketed proceeding and dated December 31, 2009, at pages 32-34.

## PRAYER FOR RELIEF

The CAPs respectfully request that the Commission:

- (1) Dismiss AT&T's damage claims without prejudice, so that it may pursue them before the SDNY Court, if they have merit. Contemporaneous with the filing of this Answer, the CAPs are filing a Motion to Dismiss the AT&T Supplemental Complaint for Damages.
- (2) Issue a Declaratory Ruling to finally provide the SDNY Court with the guidance it requested five years ago. Contemporaneous with the filing of this Answer, the CAPs are filing a Petition for Declaratory Ruling with a Proposed Order proposing specific responses to the SDNY Court's Referral Issues.

Respectfully submitted,



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in the zip code for the Arent Fox DC office.

Dated: December 1, 2014